Supreme Court, U.S.
FILED

94 1671 APR 1 2 1995

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In The

Supreme Court of the United States

October Term, 1994

Deborah Quick Scales,

Petitioner,

v.

The George Washington University,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

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QUESTIONS PRESENTED

I. CONSTITUTIONAL QUESTION

Whether the Petitioner's right to trial by jury preserved by the Seventh Amendment to the Federal Constitution has been infringed upon and whether the judgment of the court below conflicts with the unanimous decision of this Court in Lytle v. Household Manuf. cturing, Inc., 494 U.S. 545 (March 20, 1990) where the district court first resolved the Petitioner's equitable claims under Title VII solely because it erroneously and summarily dismissed Petitioner's legal claims under 42 U.S.C. Section 1981 along with her common law claims of breach of contract, fraud and intentional infliction of emotional distress.

II. STATUTORY QUESTION

Whether the court below sanctioned a violation of 28 U.S.C. Section 455(a) by the district judge and whether the district judge's impartiality might reasonably be questioned under the tenets of this Court's ruling in

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988), where:

[a] during the pendency of the case before him, the judge formed and maintained a patient-Hospital, doctor-patient relationship with the Respondent's Hospital - Petitioner's employer of over 21 years whose employment practices the Petitioner is challenging;

[b] the judge failed to disclose to Petitioner said relationship for over a period of three years while erroneously dismissing most of her claims; and

[c] finally disclosed his relationship to Petitioner but refused to recuse himself while disqualifying prospective jurors for an advisory panel for having past or present patient-Hospital relationship with the Respondent (the same or lesser reason than he had to disqualify himself.)

III. PROCEDURAL QUESTION

Whether in a Rule 52(c), Federal Rules of Civil Procedure, judgment rendered against the Petitioner at the close of her case-in-chief, a trial court may rely upon the testimony of defendant's witnesses allowed to testify out-of-turn ostensibly to facilitate scheduling conflicts and with the court's assurance that such testimony will be excluded for purposes of a Rule 52(c) motion.

LIST OF PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are those whose names appear in the caption of the case.

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OPINIONS BELOW

The judgment of the United States Court of Appeals for the District of Columbia Circuit is unpublished and is set out in the Appendix to this Petition at pages 1 - 2. The order of court of appeals denying the Petition for Rehearing and Suggestion for Rehearing en banc are unpublished and proffered herewith at pages 3 and 4 of the Appendix. The order of the court of appeals denying Petitioner's Motion for Summary Reversal is also unpublished. It appears at page 5 of the Appendix.

The district court's four summary judgments dismissing all of Petitioner's legal claims and a portion of her Title VII claims are unreported and appear as follows in the Appendix in the order of their issuance:

Order and Memorandum filed March 25, 1991 at pages 6 through 25 of the Appendix;

Order and Memorandum filed November 18, 1991 at pages 26 through 46 of the Appendix;

Order and Memorandum filed August 21, 1992 at pages 47 through 59 of the Appendix;

Order and Memorandum filed February 9, 1993 at pages 60 through 69 of the Appendix.

Finally, the district judge's bench opinion, filed July 27, 1993, is proffered at pages 70 through 122 of the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1994. A timely Petition for Rehearing before the panel and a Suggestion for Rehearing en banc were denied on January 17, 1995 [Appendix pp. 2-4]. This Petition is timely filed and the jurisdiction of this Court is properly invoked under 28 U.S.C. Sec. 1254(1) cum RULES 13.4, 10.1(c) and 10.1(a) of the Rules of the Supreme Court.

VERBATIM TEXT OF THE CONSTITUTIONAL, STATUTORY AND PROCEDURAL PROVISIONS AT ISSUE

1. Text of the Seventh Amendment to the Constitution of the United States

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

2. Text of the Pertinent Part of 28 U.S.C. Section 455

"Section 455. Disqualification of justice, judge or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; "

3. Text of the Pertinent Part of Rule 52(c), Federal Rules of Civil Procedure

"(c) Judgment on Partial Findings: If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule."

4. Text of the Pertinent Part of Rule 38, Federal Rules of Civil Procedure

"(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

"(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefore in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

"(c) Same: Specification of Issues. In the demand a party may specify the issues which the party wishes to be tried; otherwise the party shall be deemed to have demanded trial by jury for all of the issues so triable. ...."

5. Text of the Pertinent Part of Rule 39, Federal Rules of Civil Procedure

"(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action,. The trial of all issues so demanded shall be by a jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered into the record, consent to trial by the court sitting without a jury or (2) the court upon motion of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States."

GLOSSARY

To facilitate review of the Petition is proffered to describe abbreviations, acronyms and other contracted references used:

This Court refers to The Supreme Court of the United States;

USCA, the court below, the circuit court, the appeals court (interchangeably) refer to The United States Court of Appeals for the District of Columbia Circuit;

USDC, the district court, the trial court (interchangeably) refer to the United States District Court for the District of Columbia;

the Hospital, defendant's Hospital, Respondent's Hospital (interchangeably) refer to The George Washington University Medical Center or Hospital;

the judge, the district judge refer to the Honorable Judge Louis F. Oberdorfer;

AA refers to affirmative action;

APX. refers to PETITIONER'S APPENDIX proffered with this Petition under separate cover;

ANC refers to Assistant Nurse Coordinator;

ANUC refers to Acting Nursing Unit Coordinator;

EEO refers to equal employment opportunity;

LPN refers to Licensed Practical Nurse;

NUC refers to Nursing Unit Coordinator;

PNC refers to Practical Nurse Certificate;

R/N refers to Registered Nurse;

SNI refers to Staff Nurse I;

SNII refers to Staff Nurse II;

PART ONE

CONCISE STATEMENT OF THE CASE AND OF THE FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

I. STATEMENT OF THE CASE

The Petitioner, Deborah Quick Scales, is an African-American. By profession, she is a nurse with a Practical Nurse Certificate, an Associate Degree in Nursing (1974), a B.S.N. (1979), and a M.S.N. (1991).

Scales (Petitioner) served the Respondent for over a period of 21 years (9/66 - 12/87). She was a Licensed Practical Nurse ("LPN") for 7.5 years, a Staff Nurse I ("SNI") for 2.00 years, a Staff Nurse II ("SNII") for 3.33 years, an Assistant Nurse Coordinator ("ANC") for 6.83 years, Acting Nursing Unit Coordinator ("ANUC") for 0.66 years, and again as ANC for 0.5 years. For more than fifteen of these years, she was a LPN, SNI, SNII, ANC, ANUC on a unit of the Hospital known as 5-South [*APX. p.291.*] Her performance had exceeded all of her employer's requirements.

In October 1986, the NUC position for 5-South became vacant. Scales formally applied for the position following her selection to fill the position as Acting NUC effective 11/02/86. This was her fifth effort for promotion to the NUC leadership position. She was also the *only internal candidate* for the job. This entitled her to be considered for the job *before* any outside candidate [*APX. pp.293; 267.*]. However, the Hospital scheduled an outside candidate, Joan Michaels (caucasian) and Scales for interviews. Michaels never formally applied for the NUC 5-South position although she was interviewed before Scales [*APX. p.307;308.*]

But the interview was a sham since *Michaels was preselected and offered the position prior to her scheduled interview*. She herself informed her interview panel that she has already been offered the position [*APX. p.199; 309.*] Nevertheless, Michaels' rejected the position by 12/15/86. The Hospital informed Scales that she was still a viable candidate and

proceeded to readvertise the position while retaining Scales as Acting NUC.

After several months of advertising, another caucasian, Ann Cooley (Pierpoint) from outside the defendant's institution applied for the job. By March 13, 1987, she was already interviewed and offered the position. However, *Scales was never reinterviwed for the job although many of Cooley's interviewers never interviewed Scales and those who previously interviewed her did not know that Scales was still in the running* [*APX. pp.204-5; 302.*]

Following her second rejection, Scales filed a charge of racial discrimination with the EEOC. She continued to serve in the "acting" NUC position while providing training and orientation to Cooley to assume the NUC leadership. Cooley took charge of the unit on 06/15/87 and Scales was demoted back to the ANC job. Following a series of adverse personnel actions (including a fraudulent performance appraisal), Scales filed a charge of retaliation

in November 1987. She separated on 12/08/87.

The Hospital maintains *separate lines of progression* - one for blacks and another for non-blacks. Hence, blacks are promoted from SNI to SNII, on average, in 2.6 years. The average for whites is 1.2 years. From SNII to ANC, the average for blacks is 2.0 years, for whites only 1.4. Whites spend an average of only 2.7 years as ANCs. Blacks expend 7.5 years. Whites need a mere 4.6 years for promotion from SNI through NUC positions. The average for blacks is 10.3 years [*APX. p.270.* See also *APX. pp.290-301.*]

The Hospital *segregates jobs on racial lines*. As described by the district judge, the Hospital's workforce structure is "WHITE TOP AND MINORITY (BLACK) BOTTOM." Blacks are excluded from the top and upper echelon management and leadership positions. In the middle echelon management and nursing professional positions, black representation is symbolic to nil. For instance, only 4 of the 73 NUCs recruited/ promoted by the Director of Nursing over a 16

year period are black. By contrast, blacks over-dominate the low-pay, low-skill and menial job categories in some of which they represent 100 percent of the workforce [*APX. 272-280.*] As reported by the Hospital's own consultants: "*there is an understructure of Black, underpaid workers ... [who have lost] pride [in themselves.] RACIAL SEPARATION ON THE BASIS OF JOBS IS EXTREMELY STRONG*." [*APX. p.312-313.*]

Against this background, Scales filed her instant civil action on March 27, 1989. Both the federal question and diversity jurisdictions of the court were properly invoked.

In COUNTS I & II of the Complaint, Scales asserted the defendant's violations of her Title VII protection against racial discrimination and retaliation. She also asserted parallel claims under Section 1981 (Counts III & IV).

In COUNT VI, Scales claimed the defendant breached her contractual protection against racial bias as third-party beneficiary to a contract between the Hospital and the Federal

Government. In COUNT VII, she asserted that the Hospital fraudulently represented itself as an EEO/AA employer verbally and in writing, when in fact, it was not. Scales detrimentally relied on the Hospital's misrepresentations resulting in her loss of career advancements and causing her to apply for promotion to the NUC position which she was denied twice.

Finally, in COUNT IX, she asserted that the Hospital's fraudulent conduct and/or intentional racial discrimination against her constitute the common law tort of intentional infliction of emotional distress ("emotional distress").

In her Complaint, Scales specifically *DEMANDED "JURY TRIAL ON ALL ISSUES TRIABLE BY RIGHT TO A JURY."*

II. FACTS MATERIAL TO THE CONSTITUTIONAL AND STATUTORY QUESTIONS

The district judge assigned to the case was the Honorable Judge Louis F. Oberdorfer ["the judge"]. He presided over the case throughout the proceedings in the district court. While

the case was still in the discovery phase, the judge was hospitalized for a serious and life-threatening heart condition between December 1989 and January 1990 at the defendant's Hospital. After an absence of some six months, the judge returned to the bench in May 1990. Although an on-going patient-Hospital (doctor-patient) relationship was established between the judge and the defendant, the relationship was not disclosed to the Petitioner for over a period of three years, i.e. until April 19, 1993 [the first day of the bench trial.]

Meantime, the judge engaged in extremely protracted summary judgment proceedings lasting nearly three years. He rendered four summary judgments - dated March 25, 1991; November 18, 1991; August 21, 1992 and February 9, 1993 - all against Scales. He singled out and summarily dismissed each cause of action which entitles Petitioner to trial by jury. Thus, in direct breach of Rule 56 of the Federal Rules of Civil Procedure as well as the standards for summary

judgment clearly established by this Court [please see PAGES 24-27, INFRA]:

1. The judge summarily dismissed Scales' Section 1981 claims although a contested genuine issue of material fact was unequivocally established by the record and even though a critical credibility issue was pending for jury determination (propounded below at pp. 27-31.);

2. The judge summarily dismissed Scales' common law claim sounding in fraud [count VII] erroneously and unlawfully misinterpreting and drawing inferences from the Petitioner's cultural adage -- "*you've got to work twice as hard as white folks in order to get ahead*" -- when, in fact, what the Petitioner believed or did not believe, what she thought or did not think, or what her state of mind was, were all issues properly left for jury determination as a matter of law [please see pp. 36-48, infra];

3. The judge summarily dismissed Petitioner's common law claim of intentional infliction of emotional distress [count IX] as

untimely when, as a matter of statutory law and by the contents of the judgment itself, the statute of limitation controlling the claim was three years and the claim was filed within sixteen months [please see pp. 49-52, infra.];

4. The judge summarily dismissed Scales' breach of contract claim without addressing her legal and factual claim that she is a third-party beneficiary to an EEO/AA contract between the Hospital and the Federal Government [enunciated below at pp. 31-35.]

III. FACTS MATERIAL TO THE STATUTORY QUESTION

After the effective elimination of the Petitioner's access to her constitutionally preserved jury rights, the judge allowed a portion of the Title VII claims to proceed to trial. On April 19, 1993, the bench trial commenced. At the behest of the judge, an advisory jury was impanelled.

During voir dire, the judge agreed to exclude from the panel all prospective jurors who either were patients at the Hospital or who

had a family member or friend hospitalized there. He directed: "*WE WILL HAVE TO ELIMINATE PEOPLE WHO HAVE BEEN PATIENTS THERE (AT THE GEORGE WASHINGTON UNIVERSITY)*" [*APX. p. 149*].

Several prospective jurors were excluded because the judge himself questioned their impartiality based on medical treatment they, their family member(s) or close friend(s) received from the Hospital [please see *APX. pp. 145-162*.] Even a juror who received outpatient treatment at the Hospital for five to six hours was disqualified because her impartiality was reasonably questioned [*APX. pp. 147-8*] Still others were excluded for maintaining health plans with the Hospital [*APX. pp. 155-6*.]

In the course of disqualifying jurors due to their Hospital-patient relationship with the defendant, the judge, for the first time, disclosed his own patient-Hospital relationship with the defendant. He stated, addressing Petitioner's counsel:

"*THAT BRINGS UP A QUESTION. I SHOULD HAVE*

TOLD YOU THIS BEFORE. BUT I WAS A PATIENT AT GW SOME THREE YEARS AGO. I DON'T KNOW WHETHER I BROUGHT THIS UP BEFORE, BUT IT SHOULD BE BROUGHT UP. I DON'T CONSIDER IT A DISQUALIFYING FACTOR. [UPON INTERRUPTING SCALES' COUNSEL, HE CONTINUED] DON'T SAY ANYTHING NOW. I AM NOT GOING TO RECUSE MYSELF. YOU MAY NEED THIS ON APPEAL. THE DECISION ABOUT WHETHER IT IS DISQUALIFYING IS MINE. YOU DON'T WAIVE ANY CLAIM ABOUT IT BUT I WANT YOU TO KNOW IT." [*APX. PAGES 149-150.*]

Thus, having chosen not to disqualify himself in breach of 28 U.S.C. Section 455(a), the judge impanelled an advisory jury which he dismissed by the third day of the 12-day bench trial proceedings.

IV. FACTS MATERIAL TO THE PROCEDURAL QUESTION

On April 22, 1993, as Petitioner's case-in-chief progressed, the defendant informed the court that both of its expert witnesses are scheduled to be out of town and would be unavailable to testify until May 5, 1993. To avert interruption of the trial because of this event, the court suggested, and Petitioner agreed, to have the defense experts testify out-of-turn during her case in chief.

But tangent to this decision, two extremely important developments took place:

FIRST, the judge made the following unsolicited remark indicating his intent to deny defendant's motion when proffered:

> "THE COURT: NOW, THAT WILL PERHAPS CLOUD YOUR ABILITY, THE DEFENDANT'S ABILITY TO MOVE AT THE COMPLETION OF PLAINTIFF'S CASE, BUT I THINK WE'D BETTER PUT THIS WHOLE -- PUT YOUR (defense counsel's) STORY ON THE RECORD TOO. *I PROBABLY WOULDN'T GRANT THAT MOTION ANYWAY* .... SO LET'S TAKE THOSE WITNESSES OUT OF TURN." [PLEASE SEE *APX. PAGE 170.*]

Detrimentally relying on this remark, Scales completely restrategized and restructured her case-in-chief. Key witnesses she planned to call on her case-in-chief were withheld for rebuttal. Likewise, substantial documentary evidence was reordered for use to discredit the defendant's witnesses during its case-in-chief. Even the questioning of hostile witnesses was refashioned to discredit them during their testimony for the defense.

SECOND, it was also clearly understood that the testimony of defendant's witnesses taken

out-of-turn would be *excluded* from the court's disposition of the defendant's Rule 52(c) motion at the close of Petitioner's case-in-chief. Unequivocally affirming this understanding, defendant's own counsel prefaced his motion:

> "MR. FRAZIER: LET ME JUST PREFACE MY REMARKS. *IN THE COURSE OF THE PROCEEDINGS UNTIL NOW WE DID HAVE TESTIMONY OF SEVERAL DEFENSE WITNESSES. YOUR HONOR HAS INDICATED THAT FOR THESE [i.e. the Rule 52(c)] PURPOSES HERE WE ARE NOT GOING TO CONSIDER THAT TESTIMONY* AND I'M NOT GOING TO ARGUE BASED UPON WHAT DR. SEBERHAGEN AND MS. CARL [i.e defendant's expert witnesses] HAD TO SAY REGARDING WHAT THEY DID OR REGARDING WHAT MS. McCARTHY [defendant's witness] HAD TO SAY ... ON MY DIRECT." [*APX. PAGE 171.*]

The remark made by the judge and the directives upon which defendant's witnesses were allowed to testify out-of-turn were discarded in the disposition of the Rule 52(c) motion. Hence, opposing the motion, Scales' counsel reminded the judge of the remark he made and of the understanding upon which Petitioner's case-in-chief was premised. But the judge denied the remark. To wit:

'MR. MEKBIB: GOOD MORNING, YOUR HONOR. AT

THE OUTSET, YOUR HONOR, I WOULD LIKE TO INDICATE THAT WHEN MR. FRAZIER BROUGHT FORTH HIS EXPERT WITNESSES TO TESTIFY OUT-OF-TURN, YOU INQUIRED THAT THE REASON WHY THOSE EXPERTS WOULD NOT BE ALLOWED TO TESTIFY OUT-OF-TURN WAS BECAUSE THAT WOULD DISRUPT THE DEFENDANT'S ABILITY TO BRING FORTH ITS CURRENT MOTION, AND YOU INDICATED AT THE TIME THAT EVEN IF SUCH A MOTION IS BROUGHT, YOU WERE GOING TO DENY IT ANYWAY, AND PREDICATED ON THAT, YOU PROCEEDED -- (interruption by judge)

"THE COURT: I SAID I WAS GOING TO DENY THE MOTION?

"MR. MEKBIB: I BELIEVE YOU STATED THAT.

"THE COURT: I COULDN'T HAVE SAID THAT. IF I DID, THAT'S IMPOSSIBLE.

"MR. MEKBIB: AT LEAST THAT'S WHAT I THINK I HEARD.

"THE COURT: I DON'T REMEMBER SAYING ANYTHING LIKE THAT, MR. MEKBIB. I'M GOING TO DECIDE THE MOTION ON THE MERITS OF IT." [*APX. PAGES 172-3.*]

The strength of the judge's denial of his remark left no option but to proceed to fight the motion on its merits. But the remark, detrimentally relied upon by the Petitioner and as fully supported by the record, leaves no doubt that Scales was not "fully heard" as required by Rule 52(c).

More importantly, however, despite the assurances given and the understanding reached, the court relied *exclusively* and *extensively* on defendant's experts testimonies to enter judgment for the defendant. Every reason articulated in the judgment for the rejection of Scales' statistical and comparative evidence are derived from the testimonies of defendant's witnesses. Indeed, such is the extent of the court's reliance that scholarly articles submitted by defendant's expert witness are directly quoted in the judgment itself. But for such reliance, there would have been no basis for the rejection of Scales' statistical, comparative or her evidence of disparate treatment. [PLEASE SEE PART FOUR, INFRA.]

V. FACTS MATERIAL TO THE CONSTITUTIONAL AND STATUTORY QUESTIONS

On August 17, 1993, Scales filed a timely appeal from the four summary judgments as well as the final judgment rendered against her. Relying on 28 U.S.C. Section 455(a) and

455(b)(1), she moved, by Motion filed 10/12/93, for summary reversal of the five judgments.

Citing United States v. Pollard, 959 F2d 1011 (D.C. Cir.), cert. denied, 113 S. Ct. 322 (1992), the court concluded that "the district judge did not abuse his discretion ... in failing to disqualify himself." [*APX. PAGE 5.*] Petitioner respectfully submits that the court's conclusion belies the letter and spirit of Sec. 455(a) and is in conflict with the rulings and standards of this Court in Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988).

In her briefs and oral argument, Scales then urged the court below to reverse the summary dismissals of her Section 1981 and common law claims because the dismissals are erroneous, violate the mandates of F.R.Civ.P. Rule 56 and are inconsistent with the standards for summary judgment established by the United States Supreme Court and the circuit itself. She also urged reversal of the bench trial judgment noting her detrimental reliance on the

district judge's remarks and instructions as above recited. She argued that she was not "fully heard" within the purview of Rule 52(c) inasmuch as she was denied opportunity to rebut defendant's witnesses testimonies which became the entire predicate for the judgment.

The court below affirmed all of the five judgments against the Petitioner concluding that "*REGARDLESS OF WHETHER OR NOT*" *the district court correctly dismissed Petitioner's Section 1981 and common law claims, the claims fail because "(a)ppellant did not establish discrimination in her Title VII claim."* Thus, the court below validated all the judgments against Scales by according collateral estoppel effect to the Title VII bench trial judgment [*APX PAGES 1-2.*].

Petitioner respectfully submits that the judgment of the court below violates the Seventh Amendment and is in conflict with the unanimous ruling of this Court in Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (1990).

PART TWO - ARGUMENTS

I. SUMMARY OF ARGUMENTS

A. The judgment of the court below infringes upon Petitioner's Seventh Amendment right to trial by jury and conflicts with the unanimous decision of this Court in Lytle, op. cit. The judgment accords collateral estoppel effect to the bench trial judgment of the district court which resolved first Scales' Title VII equitable claims only because the court erroneously dismissed her Section 1981 and other common law claims.

B. Scales' Section 1981 claims were erroneously dismissed inasmuch as she has established contested issue of material fact as envisioned by Rule 56 and the controlling law on summary judgment.

C. Scales' fraud claim was erroneously dismissed inasmuch as contested issue of material fact is established by the record and the district court has deviated from settled law in its dismissal of the claim.

D. Scales' breach of contract claim was erroneously dismissed inasmuch as the district court failed to address the specific legal theory on which the claim is based and ignored the evidence of the record.

E. Scales' emotional distress claim was erroneously dismissed inasmuch as the claim is timely filed and the court erred-in-law.

II. THE JUDGMENT BELOW SERIOUSLY UNDERMINES PETITIONER'S SEVENTH AMENDMENT CONSTITUTIONAL RIGHTS AND CONFLICTS WITH A UNANIMOUS DECISION OF THE UNITED STATES SUPREME COURT

The Seventh Amendment to the Federal Constitution guarantees a citizen's right to trial by jury in "suites at common law." The Petitioner's entitlement to trial by jury on her common law causes of action [fraud, breach of contract and intentional infliction of emotional distress] is a constitutional mandate.

The Seventh Amendment right to trial by jury also applies to actions brought to enforce statutory rights analogous to common law causes of action; Granfinanciera S.A. v. Nordberg, 492 U.S. 33 (1989). It is settled law that, under 42 U.S.C. Section 1981, victims of racial discrimination are permitted to obtain jury trial at which both equitable and legal relief may be awarded; see, inter alia, Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (March 20, 1990); Sester v. Novack Investment, Co., 638 F.2d 1137 (8th Cir.); cert. denied. 454 U.S. 1064 (1981); Moore v. Sun Oil Co., 636 F.2d 154 (6th Cir. 1980).

From the incipiency of this civil action,

the Petitioner has demanded "JURY TRIAL ON ALL ISSUES TRIABLE BY RIGHT TO A JURY." Thus, it is a constitutional requirement that the Petitioner be afforded jury trial with respect to her Section 1981, breach of contract, fraud and emotional distress claims.

But, the appeals court affirmed the clearly erroneous summary dismissals of Petitioner's causes of action by according a collateral estoppel effect to the bench trial ruling of the district court which dismissed the Title VII claims. The court reasoned:

> "the district court dismissed appellant's claim under 42 U.S.C. Section 1981 because 'there is no indication that a promotion to NUC would create a new and distinct relationship between the employee and the employer ....' *REGARDLESS OF WHETHER THE COURT CORRECTLY SO RULED, THE CLAIM FAILS. APPELLANT DID NOT ESTABLISH DISCRIMINATION IN HER TITLE VII CLAIM. SHE THEREFORE COULD NOT HAVE SUCCEEDED ON HER SECTION 1981 CLAIM. SIMILARLY, APPELLANT WOULD ALSO HAVE HAD TO ESTABLISH DISCRIMINATION TO SUCCEED IN HER COMMON LAW BREACH OF CONTRACT CLAIM. BECAUSE SHE COULD NOT HAVE DONE SO, THE BREACH OF CONTRACT CLAIM WAS ALSO PROPERLY DISMISSED*." [*APX. pp. 1-2*.]

The reasoning and conclusion of the appeals

court is in direct conflict with the decision of this Court in Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (March 20, 1990) ["Lytle"]. The precise issue Scales presented has been addressed by this Court in Lytle a case in which Lytle, an African-American, filed both Title VII equitable and Section 1981 legal claims alleging racial discrimination and retaliation by his employer. The lower court dismissed the Section 1981 claim without a trial and then resolved the Title VII claims against Mr. Lytle at a bench trial. Lytle appealed and the Fourth Circuit affirmed the lower court's rulings noting that the elements of a cause of action under both Title VII and Section 1981 are identical and the appellant is collaterally estopped from pursuing his Section 1981 claims.

By a unanimous decision (with Justice O'Connor concurring), the Supreme Court vacated and remanded. Held:

> *"But for the dismissal of Lytle's Section 1981 claims, he would have been entitled to a jury trial on all issues common to them*

> *and his Title VII equitable claims (citation omitted) ....*" [at page 545]
>
> "*We decline ... to accord collateral estoppel effect to a district court's determinations of issues common to equitable and legal claims where the court resolved the equitable claims first solely because it erroneously dismissed the legal claims. To hold otherwise would seriously undermine a plaintiff's right to a jury trial under the Seventh Amendment.*" [at p. 555, emphasis added].

In light of the clarity of this decision and the mandates of the Seventh Amendment, the court of appeals has erred substantially. *It is not "(r)egardless of whether the (district) court correctly so ruled (i.e. dismissed the Section 1981 claims that) the claim fails." It is precisely on whether or not the district court erroneously dismissed the Section 1981 (and other common law) claims that Petitioner's Seventh Amendment jury trial rights hinge upon*. The appeals court conclusion, inter alia, that "(a)ppellant did not establish discrimination in her Title VII claim. She therefore could not have succeeded on her Section 1981 claim" is the antithesis of the Lytle decision.

Under Lytle and the Seventh Amendment, the proper inquiry is whether or not the district court resolved the Title VII claims first only because it preempted Scales constitutional demand for trial by jury by erroneously dismissing the Section 1981 and common law claims. *If it is shown that the summary dismissals of the Section 1981 and common law claims were in error, then the bench trial findings of the district court on the Title VII claims must not collaterally estop the Petitioner from her entitlement to jury trial on her legal claims*. By reversing these principles, the appeals court has seriously undermined, if not abrogated, Scales' right to trial by jury under the Seventh Amendment.

BUT FOR the district court's erroneous dismissal of Petitioner's Section 1981 and/or breach of contract and/or fraud and/or emotional distress claims, she would have been entitled to jury trial on all issues common to her Title VII, Section 1981 and common law claims

[Lytle/the Seventh Amendment/Rules 38 and 39, F.R.Civ.P.]

The district court's erroneous dismissals of Scales' legal claims are propounded below tangent to the controlling law on summary judgment and the evidence of the record.

III. PETITIONER'S SECTION 1981 AND COMMON LAW CLAIMS OF BREACH OF CONTRACT, FRAUD AND EMOTIONAL DISTRESS WERE ERRONEOUSLY DISMISSED

A. STANDARD OF REVIEW

The standard of review for summary judgment, which should have controlled the disposition of Scales' appeal and preservation of her Seventh Amendment right, is as follows.

Grant of summary judgment is reviewed de novo; see, e.g., Shields v. Eli Lilly & Co., 895 F.2d 1463 (D.C. Cir. 1990) ["Shields"]; Nikoi v. Attorney General, 939 F.2d 1065, 1068 (D.C. Cir. 1991); Liberty Lobby, Inc. v. Rees, 852 F.2d 595, 598 (D.C. Cir. 1988), cert. denied, 489 U.S. 1010 (1989).

The predicate for summary judgment is the absence of "genuine issue as to any material

fact and that the moving party is entitled to judgment as a matter of law" Rule 56, F.R.Civ.P. In 1986, the U.S. Supreme Court rendered a trilogy of decisions enunciating the standards governing summary judgment proceedings, viz: Matsushita Electric Industrial Co., Ltd. et. al. v. Zenith Radio Corp., et. al., 475 U.S. 574 (1986) ["Matsushita"]; Anderson, et. al. v. Liberty Lobby, Inc. et al., 477 U.S. 242 (1986) ["Anderson"]; and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) ["Celotex"].

The standard test for summary judgment is "whether a fair-minded jury could return a verdict for the [nonmovant] on the evidence presented." Anderson, p.251. The burden of the nonmovant is to be able "to make a showing sufficient to establish the existence of an essential element to the party's case, and on which that party will bear the burden of proof at trial." Celotex, p.322; Shields, p.1465.

In evaluating the nonmoving party's burden, the trial judge is to consider the cumulative

effect of the evidence; see Catrett v. Jones-Manville Sales Corp. v. FTC, 826 F.2d 33, 39-40 (D.C. Cir. 1980) and "grant all reasonable inferences to the nonmoving party." Exxon Corp. v. FTC, 663 F.2d 120, 126 (D.C. Cir. 1980). See also Anderson, p.255.

The trial court is to grant summary judgment "only if there is no 'significantly probative' evidence tending to support the complaint" Anderson, pp.249-50.

Furthermore, the Supreme Court has defined and delineated the roles of judge and jury in summary judgment proceedings. Thus, it is held:

> "Our holding ... on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial by affidavits. *Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences are jury functions, not those of the judge .... The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor* .... Neither do we suggest that the trial courts should act other than with caution in granting summary judgment ...." Anderson, p. 255.

As to the application of summary rulings in employment discrimination cases, held:

> "*Summary judgment should seldom be used in cases alleging employment discrimination* because of the special category in which Congress and the Supreme Court visualized these cases." Hillebrand v. M-Tron Industries, 827 F.2d 363, 363 (8th Cir. 1987).

As argued below, the summary dismissals of Scales causes of action violate the tenets and standards herein proffered and unduly infringe upon her rights to trial by jury.

B. THE DISTRICT COURT FIRST RESOLVED PETITIONER'S TITLE VII CLAIMS ONLY BECAUSE IT ERRONEOUSLY DISMISSED HER SECTION 1981 CLAIMS

In Count III, Petitioner alleges that the Hospital denied her promotion from her ANC to NUC position in December 1986 and March 1987 because of her race. In Count IV, she alleges that she was the victim of retaliation.

In December 1989, the U.S. Supreme Court rendered the Patterson v. McLean Credit Union, 491 U.S. 165, decision redefining the scope and reach of Section 1981. The University moved for summary judgment to dismiss Scales' Section 1981 claims maintaining that her promotion from ANC

to NUC is not cognizable under the statute since the promotion would not have created "a new and distinct relationship" between her and the employer as required by Patterson.

Thus, the seminal issue of material fact before the court was:

> "*Whether or not Scales' promotion from her ANC to NUC position would have created a new and distinct relationship between her and the employer as required by Patterson*."

To sustain its position, the University submitted an affidavit by its Director of Nursing, McCarthy, who described the two positions as virtually interchangeable. However, McCarthy's testimony was a complete reversal of testimony she proffered in her responses to Scales' interrogatories.

Opposing the motion and guided by Anderson, Scales set forth specific facts showing the existence of genuine issue for trial. First, she secured the *testimony of her expert witness, Dr. John Work* (Black), who, upon thorough analysis of the ANC and NUC positions at issue,

provided an extensive affidavit. His precise conclusion read:

> "*CONCLUSIONS:* *On the basis of the foregoing analysis, we conclude that, had Ms. Scales been successful in her bid to become a NUC from her ANC position, she would have formed a new, clear, distinct, substantial and fundamentally different relationship with her employer. She would have been the subject of a significant promotion. We firmly reject the view that the NUC and ANC positions are similar in scope, levels, or nature of duties and responsibilities. They simply are not."* [*APX. pp.190-191.*].

Thus, as required by Rule 56, Petitioner unequivocally demonstrated the existence of a genuine issue of material fact foreclosing the University's motion for judgment. Moreover, guided by Anderson, Scales also moved the court to deny the motion because McCarthy's affidavit raises substantial "credibility questions" since it conflicted with McCarthy's testimony in response to Scales' interrogatories. She informed the court that those credibility questions are for a jury to determine per the directives of Anderson.

However, the district court summarily

dismissed the Section 1981 claims citing Patterson and concluding: "*(t)here is no indication that a promotion to NUC would create 'a new and distinct relations between the employee and the employer ....'*" [*APX. PAGE 21*.] It dismissed Petitioner's Section 1981 retaliation claim because the underlying race bias claim (Count III) was dismissed.

Not a word was mentioned regarding the expert testimony of Dr. Work proffered at great expense and sacrifice. And while the court relied on the affidavits of McCarthy, it did not address the "credibility issues" Scales raised on the basis of the record. It is in disregard of Scales' evidence and Anderson's directive - "*the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor ...*" - that summary judgment was granted.

There can be no question that, within the precise dictum of Rule 56 and the controlling standards for review of summary judgment

(supra), Scales has established a "genuine issue of material fact" tangent to the seminal issue of whether or not her promotion from ANC to NUC position "would have created a new and distinct relationship between her and the employer."

The University was not entitled to summary judgment. Scales' Section 1981 claims were erroneously dismissed. But, instead of rectifying the erroneous dismissal, the appeals court compounded the error by validating the dismissal contrary to the tenets of Lytle and the rights granted to the Petitioner under the Seventh Amendment.

C. THE DISTRICT COURT FIRST RESOLVED PETITIONER'S TITLE VII CLAIMS ONLY BECAUSE IT ERRONEOUSLY DISMISSED HER BREACH OF CONTRACT COMMON LAW CLAIM

The Claim: Scales claims that she is an intended third-party beneficiary of an anti-bias contract between the Hospital and the Federal Government. By subjecting her to systemic racial discrimination, the University breached her rights under the contract.

Procedural History: The court initially dismissed this claim declining to exercise pendent jurisdiction [*APX. p. 22*.] Under the mandates of diversity jurisdiction, the court re-examined and reaffirmed the dismissal. Held, Scales "was an at-will employee" not subject to contractual protection [*APX. pp. 33-38*.]

Arguments: The dismissal of Count VI was clearly in error. The court completely failed to address the legal theory on which Scales' breach of contract claim has been predicated. Both in her brief and oral argument, Scales has sustained the following legal theory:

On January 21, 1977, the Hospital entered into a contract with the U.S. Department of Health, Education and Welfare in which it represented and assured, inter alia:

> *"[N]o person in the United States shall, on the ground of race ... be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the [Hospital] receives Federal financial assistance from the Department."* [*APX. p.309.*]

In consideration for its contractual assurances and representations, the Hospital became and has been a recipient of Federal grants, loans, Medicare/Medicaid payments and other financial emoluments.

Petitioner is one of the intended beneficiaries of this contract. *She is a third-party beneficiary of the contract.* The federal courts have recognized the third-party beneficiary status of protected individuals (such as Petitioner) under contracts with government entities; see, inter alia, Miree v. DeKalb County, 433 U.S. 25 (1977); Amalgamated Transit Union, Local 714 v. Greater Portland Transit District, 589 F.2d 1, 14 (1st Cir. 1978) [dictum: "... employees (are protected) whether covered by a protection as donee or intended beneficiaries of the assistance contract between the Secretary of Transportation and their employer"]; U.S. ex rel. Johnson v. Morely Construction Co., 98 F.2d 781, 788-89 (2nd Cir. 1938) [held: workers have standing to sue as

third-party beneficiaries to contract between employer and government); N.A.A.C.P. v. Wilmington Medical Center, Inc. 599 F.2d 1247 (3rd Cir. 1979); Manuel v. International vester Co., 520 F.Supp. 45 (N.D. Ill. 1980).

Likewise, District of Columbia law recognizes the contractual standing of third-party beneficiaries under contracts intended for their benefits (see Sheriff v. Medel Electric. Co., 412 A.2d 38 (D.C.App. 1980); District of Columbia v. Campbell, 580 A.2d 1295 (D.C.App. 1980); Western Union Tel Co. v. Massman Const. Co., 402 A.2d 1275 (D.C.App. 1979).

By subjecting her to systemic racial bias, the Hospital breached the contractual protection Scales is afforded as third-party beneficiary.

In granting summary judgment to the University, the court did not address this legal claim nor rule upon the factual evidence Petitioner has proffered. Instead, it chose to discuss the general theories of at-will employment which do not touch upon the premise

of Petitioner's claim.

The breach of contract claim is a "suit at common law" which entitles the Petitioner to trial by jury as she has demanded all along. However, the appeals court affirmed the dismissal by according collateral estoppel effect to the Title VII ruling of the district court. The only reason why the district court first resolved the Title VII claim is because of its erroneous dismissal of the breach of contract claim. In such order, the Petitioner has been deprived of her Seventh Amendment guarantees as the Amendment is construed and preserved by the Lytle decision.

D. THE DISTRICT COURT FIRST RESOLVED PETITIONER'S TITLE VII CLAIMS ONLY BECAUSE IT ERRONEOUSLY DISMISSED HER COMMON LAW FRAUD CLAIM

The Claim: Simply put, the fraud count asserts that the Hospital falsely represented itself as an EEO/AA employer verbally and in writing when it was not. Scales detrimentally relied upon on the misrepresentations resulting

in her loss of career opportunities and causing her to apply for promotion to the NUC position which she was denied twice.

Procedural History: The University moved for summary judgment. The district court granted the motion declining to exercise pendent jurisdiction [*APX. PAGE 22*.] Scales filed for reconsideration, reminding the court that the claims were properly asserted under the mandates of diversity jurisdiction. By Order filed 11/18/91, the court reaffirmed its dismissals but reinstated the fraud count ruling:

> "*On re-examination of the pleadings and other filings in this case, it appears defendant has failed to establish that plaintiff's fraud claim is deficient as a matter of law. Accordingly, defendant's motion for summary judgment on count VII is denied without prejudice*." However, in the same Order, the court invited the defendant to file a supplemental motion to re-dismiss the count just reinstated. [*APX. PAGE 39*].

The University filed a supplemental motion. By Order filed 08/21/92, the court re-dismissed the fraud count. Held, Scales did not rely on the Hospital's representations that it is an EEO

employer because, in her deposition testimony, she admits that her supervisor, Hamilton, Black, had apprised her "*to do or work twice as hard in order to better herself in whatever profession she took*." [*APX. PAGE 52*]. Rejecting Scales' second motion for reconsideration, the court affirmed its dismissal of the count. It held that Scales failed to demonstrate disputed facts as to the third and fourth elements of the tort as required by Celotex, supra [*APX. pp. 67-8.*]

Arguments: At the outset, the assertion that Scales' fraud claim does not demonstrate disputed facts as to each element of the tort is contradicted by the record. In her opposition motions, she has shown and substantiated the contested genuine issues of material facts as they relate to each element of the tort. Not less significant is the court's own conclusion that "on re-examination of the pleadings and other filings in this case, it appears defendant has failed to establish that plaintiff's fraud claim is deficient as a matter of law." [*APX.*

PAGE 39.] This conclusion belies the court's subsequent ruling that disputed facts are not shown per Celotex to preempt summary dismissal.

Moreover, the court misconstrued Celotex by suggesting that the decision requires "disputed facts" to be established with respect to each element of the cause of action. [*APX. p. 68.*] Celotex does not impose any such requirement. By its own text, Celotex directs that a nonmovant must be able "to make a showing sufficient to *establish the existence of an element essential* to the party's case, and on which the party will bear the burden of proof at trial." Celotex, p.322.

Indeed, Celotex could not possibly mandate proof of disputed issues of material fact with respect to each element of any cause of action. For instance, a common law claim for fraud (as in this case) has five elements [see Bennett v. Kiggins, 377 A.2d 57, 59 (D.C. 1977). According to the district court, a nonmovant would have to establish a contested issue of material fact

with respect to each of those five elements. If there are no disputed facts with respect to three or four of those elements but a contested issue of material fact is established with respect to one or two of those elements, the court will grant summary judgment despite the contested issue(s) of material fact(s) sustained by significantly probative evidence. While Celotex never suggested such an outcome, the court's reasoning abrogates the specific language of F.R.Civ. P. Rule 56(c) which predicates summary judgment on the absence of "genuine issue as to *any* material fact." Thus, the ruling against Scales is wrong as a matter of law considering the legal premise upon which the court examined the summary judgment motion.

Nevertheless, the core reason for the summary dismissal of the fraud claim how the court *interpreted* and *construed and inferred from* the deposition testimony of Scales as to conversations she had with Edna Hamilton, her Black mentor and supervisor at the Hospital

between 1974 and 1984:

> "Over the course of my employment with Edna, I had discussions and she would always ... tell me about the problems she was having because she was Black and how ... I as a Black staff nurse, or whatever, would have to do or work twice as hard in order to better myself or to do better in whatever job or profession that I took ....
>
> "She (Hamilton) discussed the problem that because I am Black, I would have to work harder, if I wanted a promotion, I would have to do better on the unit, I would have to exceed in my evaluation, I would have to excel in my performance in order to get promotions, or what have you .... She told me that I would have to perform better than my white counterparts in order to better myself, in order to get the promotion."

At the behest of the University, the court *interpreted* and *inferred* from this testimony the remarkable conclusion:

> *"regardless of what plaintiff may have believed regarding defendant's assertions that it is an equal opportunity employer when she was hired in 1966, at some time between 1974 and 1984, and certainly not later than July of 1984, plaintiff was not acting or forebearing in reliance on such assertions."* [*APX. PAGES 53-54.*]

In a Motion for Reconsideration filed 09/30/92, Scales submitted that the court has misconstrued her testimony. To wit:

1. By affidavit filed 09/30/92, Scales

explained the socio-cultural context in which she communicated with Hamilton. She testified:

> "... I did trust and believed my employer completely. I believed in their claim that the [Hospital] is an [EO] employer ... and [AA] employer. I believed my employer would not discriminate against me because of my race since I was loyal to them ...
>
> "When Mrs. Hamilton ... was telling me that I 'as a black staff nurse ... would have to do or work twice as hard in order to better myself or to do better in whatever profession I took' I did not think or believe that she was telling me that my employer was discriminating against .... When Mrs. Hamilton was telling me that 'I would have to work harder if I wanted a promotion, I would have to do better on the unit, I would have to exceed in my evaluations, [or] I would have to excel in my performance in order to get promotions' I did not think or believe that I was being discriminated against because of my race .... At no point has Mrs. Hamilton told me that I or her are the subject or racial discrimination by the [Hospital] ....
>
> "*[Her advise] was not any different from the advice that my father and mother had given me - 'you need to work twice as hard as white folks if you want to get ahead.' .... All around me, Black people have been saying the same things .... [Her advise to me is] part of my cultural heritage as an African American .....*"

2. In support of her submission, Scales also proffered the affidavit [filed 09/30/92] of

her 70 year old mother, Regina Quick:

> "With a family of eight children, it was important that we learned how to deal with racism and discrimination ....
>
> "... we taught our children to trust and honor God. We taught them to work hard and to work harder .... We taught them to persevere .... We taught them to be honest, to have integrity, to do the best job they can. *We taught them to work twice as hard as white people so they get noticed*.... we taught them that their future depended on education ....
>
> "... *I do not think that Mrs. Hamilton was telling my daughter that she was being discriminated against because of her race when she advised her to work twice as hard as her white colleagues. I told Deborah [Petitioner] to work twice as hard as white people even before she became an employee of the [Hospital]. I have told all my children to work twice as hard as white people if they wanted to get ahead.... I am not aware of any Black family of my generation that did not advise young Blacks to work twice as hard and to compete twice as hard as whites. [This] is part of our African-American culture* ...."

3. In furtherance of the validity and reality of her submissions, Petitioner proffered the court below an article by Dr. Lonnie Bunch, Black, Culture Historian and Curator with the Smithsonian Institution. The author notes:

> "... I had to prove my worth ... Having to

prove my worth is not knew to me or for most black Americans .... *[F]or both guidance and motivation, I simply relied on an adage that African-American parents have taught their children for generations: in America, blacks 'have to work twice as hard to get half as far.*" Lonnie G. Bunch, Ph.D., Exhibiting American Culture in Japan, MUSEUM NEWS, 4/94, p. 32; 35 col. 1.

4. Petitioner also offered the district court the *testimonies of two of her expert witnesses. Dr. Lennox Joseph*, Black, a leading Behavioral Scientist, testified:

> "Prior to her denial (of promotion), Mrs. Scales was in a very insulated environment .... She was not aware of the consequences of the differentiation of behavior by individuals to her because of her race .... *What happened with the denial was that for the first time she called into question all the behaviors and values espoused and in use by the system (at the University) and began to reevaluate it with a certain insight that she didn't have prior to that time*." DEPOSITION OF DR. LENNOX E. JOSEPH, MAY 7, 1990, pp.72-73

Yet another expert witness, *Dr. Andrew Molchon, M.D., Psychiatrist*, testified as to Scales' total trust and faith in her employer:

> "*Had she [Scales] not been a long term employee and had she not been an employee who developed expectations of loyalty running both ways between her and her employer, then she would have, in my*

opinion at least, less likely have viewed this [her rejections for the NUC position] as a humiliating, devastating event in her life." DEPOSITION OF DR. ANDREW MOLCHON, MAY 1, 1990, at p.36.

In total disregard of this record, the court ruled "*it is clear that at least some of the statements in plaintiff's deposition do reveal her awareness of discrimination at the University (and, in fact affecting her). To the extent that plaintiff now attempts to contradict that conclusion in her newly filed affidavits, such an effort to create a genuine issue of fact must fail.*" [APX. pp. 66-67.]

The ruling is not only erroneous but tragic. Scales' affidavit did not retract one word from her deposition testimony nor attempt to modify the contents thereof. What she has and continues to question is the *illegitimate misinterpretation* of her testimony and the arbitrary *inferences* drawn from her testimony as to her state of mind, her beliefs and values.

By disregarding Petitioner's evidence, the court reached the incredible conclusion that

there is no genuine issue of material fact. In such order, it deviated from the basic tenets of Rule 56. *It was not for the judge to interpret Petitioner's testimony, to construe or misconstrue her communications with her African-American supervisor, or draw inferences therefrom, or adjudge the socio-cultural setting within which the Petitioner communicated with her mentor*. As directed by *Anderson*, these are *jury functions*.

The court also engaged in credibility determinations involving what Scales' state of mind was, what she knew or did not know, what she believed or did not believe .... Yet, *Anderson* instructs: "*credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences are jury functions, not those of the judge* ... " [at page 255.] And where *Anderson* directs that "*the evidence of the nonmovant is to be believed*," the court disregarded Scales' evidence *in toto* and engaged in arbitrary inferences and the misreading of

Petitioner's state-of-mind. In so doing, it also traversed the dictum that it is for the jury to determine when plaintiff discovered or should have discovered the alleged act of fraud; see Kropinski v. World Plan Executive Council, 853 F.2d 948 (D.C. Cir. 1988).

It is tragic that a federal court in charge of the enforcement of our constitutional and civil liberties would so disregard the culture and values of a whole segment of our society:

> "*the proposition [that Petitioner was always taught to work twice as hard as whites in order to advance equally] implies a belief that discrimination is ubiquitous in our society, and such a belief tend to undermine an assertion of reliance on any institution's representation that it is an equal opportunity employer*." [*APX. p. 68.*]

Through this process in which African-American culture has been the subject of judicial broad-brush, there was not even a black clerk in the judicial setting to speak up on behalf of Scales. The Seventh Amendment is intended to avert such a disconcerting prospect.

It is unequivocal that Petitioner has

established a contested issue of material fact. The summary dismissal of this common law claim is in breach of Rule 56, the tenets of Anderson and the standard of review propounded above. The appeals court affirmance of the dismissal conflicts with Lytle and seriously undermines Petitioner's constitutional protection.

E. THE DISTRICT COURT FIRST RESOLVED PETITIONER'S TITLE VII CLAIMS ONLY BECAUSE IT ERRONEOUSLY DISMISSED HER COMMON LAW CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The Claim: Petitioner claims that the fraudulent conduct and/or intentional racial discrimination the University subjected her to constitute the tort of emotional distress.

Procedural History: The court initially dismissed the count declining to exercise pendent jurisdiction [*APX. PAGE 22*.] When Petitioner demonstrated that the claim was properly before the court under the mandates of diversity jurisdiction, the court affirmed its dismissal concluding that the "claim is time barred." [*APX. PAGES 40-43*.]

Arguments: The dismissal of the emotional distress claim is wrong as a matter of law. It reflects a misreading of the claim itself and a misreading of the statute of limitation.

In *Saunders v. Nemati*, 580 A.2d 660 (D.C. App. 1990) [*"Nemati"*], the Appellate Court held that the tort of intentional infliction of emotional distress has "*independent existence ... in the District ... and in American Jurisprudence generally.*" [At p.661].

When the tort is asserted as an "independent action ..., not intertwined with any of the causes of action for which a period of limitation is specifically provided by D.C. Code Section 12-301, [the applicable statute is] the general residuary three year limitation of [D.C. Code] Section 12-301(8)." Nemati, p.665. When the tort is "intertwined" with any of the causes of action for which a period of limitation is provided by D.C. Code Section 12-301, then the limitation governing the cause(s) of action with which the tort is intertwined

applies; Nemati, pp.665-7.

Under Nemati, there is no basis to suggest that Petitioner's emotional distress claim is time barred. If, as it should [per the text of the Complaint], her claim is construed as an independent action, then it is governed by the "general residuary three year limitation of D.C. Code Section 12-301(8)." Inasmuch as the court recognizes that the claim was filed "*sixteen months*" from the last unlawful act complained of [*APX. pp. 43-44*], it is timely filed.

Even if the claim was not asserted as an independent tort, it is "*intertwined*" with several causes of action for which a three year statute of limitation is provided. To wit:

Petitioner specifically asserts that she was caused extreme emotional distress by "*the fraudulent conduct*" of the Hospital [Complaint, pp. 60-61]. Thus, her emotional distress and fraud counts are "intertwined" by the precise content of the Complaint.

Now, it is extremely important to note here

that by the same Order filed 11/18/91 [APX. pp. 43-44] in which the court dismissed Petitioner's emotional distress claim [count IX] as "time barred," it also concluded that "defendant has failed to establish that plaintiff's fraud claim is deficient as a matter of law" and reinstated the fraud count [APX. pp. 39 & 46].

The statute of limitation for a cause of action sounding in fraud is three years per D.C. Code Section 12-301(8) [see, inter alia, King v. Kitchen Magic, 391 A.2d 1184 (1978)]. *Since Scales' emotional distress [count IX] and fraud [count VII] claims are "intertwined" within the precise dictums of Nemati, the statute of limitation controlling her emotional distress claim is three years.* The ruling that Scales' count IX is time barred is clearly erroneous. Furthermore, dismissal based on statute of limitation presents a question of law to be reviewed de novo on appeal; see Donoghue v. County of Orange, 848 F.2d 926 (9th Cir. 1987).

The emotional distress claim is not time

barred either as a matter of law or fact. The district court first resolved Petitioner's Title VII claim only because it erroneously dismissed her intentional infliction of emotional distress claim. Scales is constitutionally entitled to trial by jury on her cause of action.

PART THREE

THE COURT BELOW HAS SANCTIONED VIOLATION OF 28 U.S.C. SEC. 455(a) cum LILJEBERG v. HEALTH SERVICES ACQUISITION CORP., 486 U.S. 847 (1988) BY THE DISTRICT JUDGE

I. SUMMARY OF ARGUMENTS

The district judge's impartiality might be reasonably questioned under Sec. 455(a) in light of the Hospital-patient, doctor-patient relationship he maintained with the defendant during the pendency of the case. The court below sanctioned the judge's violation of the statute and the Liljeberg ruling by concluding that the judge did not abuse his discretion.

II. ARGUMENTS

28 U.S.C. Sec. 455(a) mandates that "(a)ny ... judge ... of the United States shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned." It is held that:

> *"violation of Sec. 455(a) ... is established when a reasonable person, knowing the relevant facts, would expect that a judge knew of circumstances creating an appearance of partiality, notwithstanding a finding that the judge was not actually conscious of those circumstances."* Liljeberg v. Health Services Acquisition Corp., *108 S.Ct. 2194, 2196 (1988).*

In enacting Sec. 455, Congress intended to adopt "objective," "reasonable factual basis-reasonable man" standard, *as opposed to the judge's "own opinion of his impartiality."* Recusal is required where "*average person on street might be inclined to harbor doubts about judge's impartiality*": see, inter alia, Fong v. American Airlines, Inc. 431 F.Supp. 1334 (ND Cal. 1977); Davis v. Board of School Comrs. 517 F2d 1044 (CA5 Ala., 1975); rehearing denied, 521 F2d 814, cert. denied 425 U.S. 944; United States v. Ritter, 540 F2d 459 (CA 10, 1976); cert. denied 429 U.S. 951; United States v. Conforte, 624 F2d 869 (CA9 Nev. 1980); cert. denied 449 U.S. 1012; Re. Teltronics Services, Inc. 39 BR 446 (BC ED NY, 1984); Re Olson, 20 BR

206 (DC Neb. 1982).

The purpose of Sec. 455 is "to promote public confidence in the integrity of the judicial process {and} does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew." Liljeberg, supra, at page 2203. Indeed, Sec. 455 requires judges to avoid even the appearance of partiality. Held:

> "*The goal of Sec. 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible.*" *Hall v. Small Business Administration, 695 F2d 175, 179 (5th Cir. 1983).*

It is the judge who has the duty to monitor his own extra-judicial actions and conduct. He "must know" his interest and of the disqualifying facts which risk that his impartiality might reasonably be questioned.

Section 455 is construed to be "self enforcing" and envisions sua sponte disqualification of judge where impartiality might be reasonably questioned. Potashnick v. Port City Constr. Co., 609 F2d 1101 (CA5, Ala. 1980); cert. denied, 449 US 820; Liljeberg, supra, 2202; Idaho v. Freeman, 507 F. Supp. 706 (DC Idaho, 1981); et. al.

The issue in the case at bar is whether or not the judge was required to disqualify himself pursuant to Sec. 455(a) because his impartiality might reasonably be questioned in view of his patient-Hospital relationship with the defendant?

There can be no question that "any average person on the street," would reasonably question the judge's impartiality in view of the relationship he formed and maintained with defendant's Hospital for over a period of three years during the pendency of the case. *Indeed, the judge himself has recognized that patient-Hospital, patient-doctor relationship with the*

defendant was an objective and reasonable disqualifying factor. Based on this precise objective and reasonable disqualifying factor, several prospective jurors (including those who spent five to six hours at defendant's Emergency Room) were disqualified by the judge from serving on the advisory jury panel [please see *APX. pp. 145-166*.]

His own specific directive was: *"WE WILL HAVE TO ELIMINATE PEOPLE (PROSPECTIVE JURORS) WHO HAVE BEEN PATIENTS THERE (AT THE GEORGE WASHINGTON UNIVERSITY HOSPITAL)."* Please see *APX. p. 149.* Predicated on his own assessment that the fairness and impartiality of jurors might reasonably be questioned because of their or their family members patient-Hospital relationships with the defendant, he disqualified JURORS # 3275, 2737, 4010, among others. [*APX. p. 145 et. seq.*]

He extended the reach of his directive to include jurors who visited the Hospital as out-patients on an emergency basis. Thus, he

disqualified JUROR 4045, who was treated at the Emergency Room of defendant's Hospital for five to six hours [*APX. pp. 147-148.*] He recognized the reasonable probability that a patient (whether inpatient or outpatient) would have opportunity to observe and form opinions as to the employer-employee relationships and "employment practices" which exist at the defendant's Hospital. On this basis too, he questioned the fairness and impartiality of prospective jurors and ruled to disqualify them. [*APX. p. 145 et. seq.*]

Thus, of a prospective juror whose son had surgery at the defendant's Hospital, the judge asked: "Did you have an opportunity to observe the employment practices there (at the Hospital)?" [*APX. page 147.*] Of yet another juror who visited the Hospital for a routine test, he asked: "Anything about that experience that gave you an occasion to observe the relationship between people who work there in the Hospital?" [*APX. page 151.*] Of Juror #

4045, he asked: "Did you have an opportunity there to observe in that time (the five to six hours the juror was at defendant's Emergency Room) the working arrangements?" [*APX. p. 147.*]

By his own questions, by his own judgment, by his own directives, the judge has concluded that a patient-Hospital relationship with the defendant serves as a basis to question one's fairness and impartiality. The relationship between doctors and patients is one to which our legal regime imputes unique significance to the point of carving out and recognizing "the doctor-patient privilege" - a privilege cognizant of the unique, trusting and personal nature of the relationship.

The nurses and nursing administrators who testified by affidavit or at trial before the judge were the nurses who cared for him or planned his primary, cardiac, CCU, PCCU care. The doctors who were scheduled to testify before him were those with whom he shares a unique and privileged relationship. In defiance of Rule

455(a), he chose to adjudicate their employment practices, acts and omissions against the claims and challenges of the Petitioner.

Whatever may be the "objective" "reasonable man" standard, the relationship the judge had formed and maintained with the defendant during the pendency of this case before him must lead to the conclusion that the "judge knew of circumstances creating an appearance of partiality" whether or not he was "pure in heart and incorruptible."

It is a gargantuan abuse of sound judicial discretion for the judge to refuse to recuse himself for the same underlying reason (Hospital-patient relationship) that he found reasonable and objective enough to question the impartiality of prospective jurors and disqualify them for less reason than he had to disqualify himself. *The Congressional mandates of Section 455 are directed to the judge who is expected to obey them and employ them with utmost good faith. The judge clearly abused his*

power by creating a double standard under which he exempted himself from recusal while disqualifying Petitioner's peers - those reasonable citizens on whom we rely as jurors - for the same or lesser reason than he had to recuse himself.

The court of appeals chose to overlook the judge's deviations from the letter and spirit of Section 455(a) and the mandates of this Court in Liljeberg. Instead, it validated his conduct citing its decision in United States v. Pollard, 959 F.2d 1011 (D.C. Cir.) - a decision detached from Section 455(a) and exclusively focused on Section 455(b)(1). In such order, the court below sanctioned a clear and unequivocal violation of the Congressional mandate under Section 455(a) by the district judge.

PART FOUR

THE RULE 52(c) JUDGMENT RENDERED AGAINST THE PETITIONER IS PROCEDURALLY DEFICIENT BECAUSE PETITIONER WAS NOT HEARD "IN FULL"

After the erroneous summary dismissals of Petitioner's legal claims, a portion of Scales'

Title VII claims were bench tried.

During her case-in-chief, the court received the testimonies of defendant's expert witnesses to accommodate their conflicting schedules and facilitate the trial. But, Petitioner's opportunity to be "heard in full" was irreparably compromised as set forth below:

A. In deciding to allow defendant's experts to testify out of turn, the judge made an unsolicited remark (cited above at page 12) indicating:

> "THE COURT: *I PROBABLY WOULDN'T GRANT THAT [defendant's Rule 52(c)] MOTION ANYWAY .... SO LET'S TAKE THOSE WITNESSES OUT OF TURN*." [*APX. p. 170.*]

Relying on this remark, Petitioner restructured and reordered the presentation of her testimonial and documentary evidence during her case-in-chief. She withheld key witnesses and postponed the introduction of critical documentary evidence to rebut defendant's case-in-chief and discredit defendant's witnesses.

But this was not to be. Notwithstanding

the Petitioner's detrimental reliance on his remark, the judge vehemently denied ever making such a statement [*APX. page 172 contradicted by the record at page 170.*] He concluded that he will decide defendant's Rule 52(c) motion "on the merits of it." [*APX. p. 172*.]

On this basis alone, it cannot be said that Petitioner "has been fully heard" as envisioned by Rule 52(c) to be subjected to a judgment on partial findings. As the record unequivocally demonstrates, the judge did make the remark despite his denials. Scales detrimentally relied on the remark - as she must and should - preempting her rights and opportunities to introduce the evidence at her disposal. With witnesses waiting to be heard and documents pending proffer, it cannot be said Rule 52(c) was complied with in the rendering of the July 27, 1993 judgment.

B. *Equally significant was the clear understanding that the testimonies of defendant's witnesses will be excluded from*

consideration in any motion the defendant might initiate at the close of Scales's case-in-chief.

In affirmance of this directives of the court, the defendant's counsel himself prefaced the Rule 52(c) motion as follows:

> "MR. FRAZIER: LET ME JUST PREFACE MY REMARKS. *IN THE COURSE OF THE PROCEEDINGS UP UNTIL NOW WE DID HAVE TESTIMONY OF SEVERAL DEFENSE WITNESSES. YOUR HONOR HAS INDICATED THAT FOR THESE PURPOSES HERE WE ARE NOT GOING TO CONSIDER THAT TESTIMONY AND I'M NOT GOING TO ARGUE BASED UPON WHAT DR. SEBERHAGEN OR MS. CARL HAD TO SAY REGARDING WHAT THEY DID OR REGARDING WHAT MS. McCARTHY HAD TO SAY ... ON MY DIRECT."* *(APX. page 174).*

Despite its own directives and the parties' understanding, the court rendered the judgment below extensively relying upon the defendant's expert witnesses. Indeed, there is no shred of evidence to sustain the court's rejection of Scales' critical statistical and comparative evidence but for its unfettered reliance on the defendant's testimonies. To wit, inter alia:

1. In rejecting Scales' statistical evidence [*APX pp. 95 et. seq.*] and dismissing her claim, the court opined that Dr. Work

(Scales' expert) "merged data for the period 1981 through 1989" and for this reason the data has diminished probative value [*APX. p. 95.*]

The reasoning that Dr. Work "merged data" is an argument extensively propounded by Dr. Seberhagen [defendant's expert witness] who testified during Petitioner's case-in-chief. [Please see *APX. pp. 209-210; 242-245; 254-258.*]

2. The court's reasoning that "the sample size used in Dr. Work's analysis is too small ..." [*APX. pp. 112-3*] is the precise argument enunciated by defendant's expert. Please see *APX. pp. 215-217; 229-220; 246-250.*

3. Each of the five arguments the court listed for rejecting Dr. Work's analysis on Nursing Unit Coordinator educational qualifications [*APX. pp. 112-3*] were derived, almost verbatim, from the testimony of the defense expert. *APX. pp. 214 et. seq. 229-242.*

4. Even the so-called "scholarly publications" the court took judicial notice of [*APX. p. 113 footnote 18*] are the precise

publications which the judge asked for and were proffered by Dr. Seberhagen, defendant's expert. Please see *APX. pp. 248; 250.*

It cannot be said that the Petitioner was "heard in full" within the purview of Rule 52(c) when her detrimental reliance on the judge's remarks and directives have denied her the opportunity to rebut the defendant's evidence. After all, according to the Notes of Advisory Committee on Rules, Rule 52(c) is a progeny of the former Rule 41(b). The impropriety of a judge's reliance on defendant's witness testimony to decide on a Rule 41(b) motion is clearly recognized.

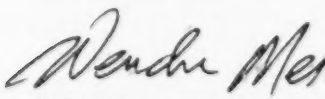
Thus, it is held that a Rule 41(b) judgment is improper "*if the judge weighed the testimony of defendant's ... witnesses as well as plaintiff's evidence*" Sanders v. General Services Administration, 707 F.2d 969, 972 (7th Cir. 1983). Those recognized principles of fairness and propriety must also guide the interpretation and application of Rule 52(c).

Against this background, the affirmance of the district court's judgment by the circuit court engenders a profound miscarriage of justice.

CONCLUSION

For the above reasons, certiorari should be granted to review the judgment and order below, summarily reverse the judgment and order of the D.C. Circuit, mandate the disqualification of the district judge and remand the case [the Section 1981, breach of contract, fraud, emotional distress and Title VII claims] for jury trial and adjudication by a district judge whose impartiality might not be reasonably questioned.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

I certify that a complete copy of the foregoing "Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit" and its accompanying Appendix was mailed, by first class mail, postage prepaid, on this 12th day of April, 1995, to Thomas D. Quinn, Jr., Esquire, REASONER, DAVIS & FOX, 888 Seventeenth Street, N.W., Suite 800, Washington, D.C. 20006-3994; attorneys for the Respondent, the George Washington University.

Wendu Mekbib

Wendu Mekbib
Attorney and Counsel of Record
for the Petitioner

Supreme Court, U.S.
FILED

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No. _____

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

Deborah Quick Scales,

Petitioner,

v.

The George Washington University,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

---

PETITIONER'S APPENDIX

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3170

PETITIONER'S APPENDIX

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BEST AVAIL

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1994

NO. 93-7151
(89cv00796)

DEBORAH QUICK SCALES
APPEALANT

v,

THE GEORGE WASHINGTON UNIVERSITY,
APPELLEE

FILED NOVEMBER 28, 1994
RON GARVIN, CLERK

Appeal from the United States District Court
for the District of Columbia

Before: WALD, SILBERMAN, and RANDOLPH, Circuit *Judges*

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by and oral argument of the parties. The court has determined that the issues presented occasion no need for an opinion. *See* D.C. Cir. Rule 36(b). It is

ORDERED AND ADJUDGED that the district court's orders of November 18, 1991, August 21, 1992, February 9, 1993, and July 27, 1993, be affirmed substantially for the reasons given by the district court. In the remaining order, issued on March 25, 1991, the district court dismissed appellant's claim under 42 U.S.C. § 1981 because "[t]here is no indication that a promotion to NUC would create 'a new and

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distinct relation between the employee and the employer . . .'" March 25, 1991 Memorandum Opinion at 10 (citation omitted). Regardless of whether the court correctly so ruled, the claim fails. Appellant did not establish discrimination in her Title VII claim. She therefore could not have succeeded on her section 1981 claim. Similarly, appellant would also have had to establish discrimination to succeed in her common law breach of contract claim. Because she could not have done so, the breach of contract claim was also properly dismissed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a).

Per Curiam
For the Court

Ron Garvin, Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1994

NO. 93-7151
USDC CV 89-0796

DEBORAH QUICK SCALES
APPEALANT

v,

THE GEORGE WASHINGTON UNIVERSITY,
APPELLEE

FILED JANUARY 17, 1995
RON GARVIN, CLERK

BEFORE: Wald, Silberman and Randolph, Circuit Judges

O R D E R

Upon consideration of appellant's Petition for Rehearing, filed December 16, 1994, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1994

NO. 93-7151
USDC CV 89-0796

DEBORAH QUICK SCALES
APPEALANT

v,

THE GEORGE WASHINGTON UNIVERSITY,
APPELLEE

FILED JANUARY 17, 1995
RON GARVIN, CLERK

BEFORE: Edwards, Chief Judge; Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

O R D E R

Appellant's Suggestion For Rehearing In Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court in banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY:
Robert A. Bonner
Deputy Clerk

Circuit Judge Tatel did not participate in this matter.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1994

NO. 93-7151
89cv00796

DEBORAH QUICK SCALES
APPEALANT

v,

THE GEORGE WASHINGTON UNIVERSITY,
APPELLEE

FILED JANUARY 04, 1994
RON GARVIN, CLERK

BEFORE: Silberman and Ginsburg, Circuit Judges

O R D E R

Upon consideration of the motion for summary reversal, the opposition thereto and the reply, it is

ORDERED that the motion be denied. The district judge did not abuse his discretion, see United States v. Pollard, 959 F.2d 1011, 1031 (D.C. fir.), cert. denied, 113 S- Ct. 322 (1992), in failing to disqualify himself pursuant to 28 U.S.C. Sec. 455. Because this issue has been fully considered and disposed of by the court, the parties shall limit their subsequent submissions to matters not decided by this panel. It is

FURTHER ORDERED that appellant's request for sanctions be denied.

Per curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED MARCH 25, 1991
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

DEBORAH QUICK SCALES
Plaintiff

v.

THE GEORGE WASHINGTON UNIVERSITY
Defendant

Civil Action No. 89-0796-LFO

MEMORANDUM

Plaintiff Deborah Quick Scales was employed as a nurse by defendant George Washington University Hospital from 1966 to 1987. In 1973, she was assigned to a unit known as 5-South. In 1981, she was promoted to the position of Assistant Nurse Coordinator (ANC). In October, 1986, Scales sought promotion from ANC to the position of Nursing Unit Coordinator (NUC) of 5-South. Scales is black. In count one, claiming both disparate impact and disparate treatment, Scales alleges that she was denied the NUC position on the hasps Of race discrimination in

violation of Title VII, 42 U.S.C. § 2000e, et. seqS In count two, she alleges that defendant retaliated against her for filing an EEO complaint by issuing a performance evaluation containing falsehoods and malicious accusations, awarding her a smaller salary increase than that granted to her coworkers, directing Scales to alter performance appraisals she had written, making false statements about her work, failing to provide her with leadership and support, and denying her the opportunity to attend meetings important to her work. In counts three and four, Scales alleges that defendant violated 42 U.S.C. § 1981 and the Thirteenth Amendment by discriminating against her in contracting with her and retaliating against her. Plaintiff also alleges the following common law charges in counts five through nine: (5) that as a result of defendant's discrimination she was constructively discharged from her employment on December 8, 1987; (6) that defendant breached an implied provision of the employment contract

that she would not be discriminated against; (7) that defendant defrauded her by representing in its employment manual that employment decisions would be non-discriminatory; (8) that by discriminating against her defendant breached implied covenants of good faith and fair dealing in its employment contract with her; and (9) intentional infliction of emotional distress.

Defendant moves for summary judgment on all counts. See Defendant's Motion for Partial Summary Judgment (filed October 15, 1990); Defendant's Supplemental Motion for Summary Judgment (filed January 11, 1991). For the following reasons, summary judgment will be granted in favor of defendant on counts three through nine. However, defendant's motion must be denied in part with respect to counts one and two.

I.

A.

Plaintiff and defendant agree that plaintiff has established a prima facie case of

disparate treatment discrimination under Title VII. See McDonnell Douglas Corn. v. Green, 411 U.S. 792, 802 (1973). The parties also agree that defendant has articulated non-discriminatory reasons for its decision not to promote plaintiff. Defendant explains that, following a series of interviews, defendant first selected Joan Michaels for the NUC position. When Michaels declined the offer, defendant selected Ann Cooley. Defendant contends that both of those candidates were better qualified than Scales because they each had more education and supervisory experience than Scales. With respect to educational qualifications, Michaels was within one semester of obtaining a Masters of Science in Nursing degree (M.S.N.) and Cooley had obtained an M.S.N., whereas Scales (who had enrolled in an M.S.N. program in September, 1986) had completed no credits towards a M.S.N. With respect to experience, Michaels had three years of experience as head nurse at Sibley Memorial

Hospital and Cooley had one to two years of experience as a head nurse at National Rehabilitation Hospital and several months of experience as an acting NUC at George Washington University Hospital, whereas plaintiff's only experience in comparable supervisory positions was that she began serving as acting NUC on November 2, 1986, at approximately the same time her application was under consideration.

Plaintiff asserts that these reasons are a pretext for discrimination. Plaintiff argues that defendant's educational requirements for the NUC position have no rational relationship to the job's requirements and have a discriminatory impact on blacks and other minorities. [1] Plaintiff offers no direct

---

[1] Plaintiff does not concede that an M.S.N. is a required qualification for the NUC position. Instead, she asserts that defendant maintains a multiplicity of educational requirements and that this multiplicity has an adverse impact on blacks. See Plaintiff's Supplemental Opposition to Defendant's Supplemental Motion for Summary Judgement (filed January 25, 1991) at 14-17. In support, plaintiff alleges that defendant established

evidence to controvert defendant's assertion that Michaels and Cooley were selected and plaintiff was not selected on the basis of education and supervisory experience. However, plaintiff filed an affidavit by Gina Marie Brooks, a staff nurse who worked in 5-South. Brooks was asked to serve as one of four group interviewers of Michaels and Scales for the NUC position sought by Scales. Brooks interviewed Michaels but has no recollection of interviewing Scales. Brooks Aff. at I 6. Brooks states that, in her opinion, Scales was by far the best qualified candidate for the NUC position. Id. at s 8. She explains that Scales had over twenty years of experience, including fourteen in 5-South, and seven as ANC for that unit. She also contends that Scales had "demonstrated

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three separate educational criteria for the position she sought: an internal, confidential, memorandum set the minimum requirement to be a B.A./B.S. degree; a job description stated that an M.S.N. or the equivalent was required; and a Washington Post advertisement stated: "M.S.N." Id. at 14-16.

outstanding leadership and management capacity" and had "outstanding working, supervisory and interpersonal relationships" with coworkers. Id. Brooks also attested in contravention of certain statements made by defendant's employers at depositions. Her testimony disputes several additional non-discriminatory reasons offered at those depositions for not promoting Scales. See Plaintiff's Supplemental Opposition to Defendant's Supplemental Motion for Summary Judgment (filed January 25, 1991) at 17-25. For example, Michael Tillman, plaintiff's supervisor, stated in his deposition testimony that one reason for not promoting Scales was that, while serving as acting NUC, she kept the door to her office closed and was thus less communicative than the former NUC. Brooks stated that Scales' door was less frequently closed than her predecessor's door. See Brooks Affidavit at q 19. It appears unlikely that Brooks' affidavit, in the absence of additional evidence in support of plaintiff's claim, will

satisfy Scales' burden of showing at trial that defendant's reliance on educational and supervisory experience and other stated reasons for nonselection of Scales was a pretext for discrimination. Nevertheless, this evidence is not so inconsequential that no reasonable trier of fact could find for plaintiff. Accordingly, defendant's motion for summary judgment on the question of whether defendant intentionally discriminated against plaintiff in denying her the promotion she sought must be denied.

B.

Plaintiff also asserts that defendant's policies, patterns, and practices have an adverse impact on blacks and other minorities. To establish a Drima facie claim for disparate impact, plaintiff must show that "the application of a specific or particular employment practice [] has created the disparate impact under attack." Wards Cove Packina Co. v. Atonio, 109 S. Ct. 2115, 2124-25 (1989). Thus, a plaintiff is required not only to show that

statistical disparities exist but also to identify the specific employment practice that is responsible for statistical disparities and to demonstrate a causal link between the practice and the disparities. Id.; see also Watson v. Fort Worth Bank & Trust, 108 U.S. 2777, 2788 (1988). Plaintiff alleges that statistical disparities exist and submits an affidavit from John W. Work, VI, plaintiff's expert, attesting to such disparities. See Complaint at qq 47-50; Affidavit of John W. Work VI. Though defendant disputes the findings of Work, a genuine issue of material fact exists with respect to statistical disparities. However, plaintiff identifies only general, rather than specific, discriminatory policies and practices. Plaintiff alleges that defendant maintained discriminatory promotional policies, educational requirements and preferences, and salary increases and caps placed on salary following a certain number of years of employment. Complaint at qq 51-54. It is

unlikely that these vague allegations satisfy the requirement established by Wards Cove and Watson for identification of specific employment policies and practices. But, in any event, plaintiff's disparate impact claim cannot be sustained because plaintiff assumes, rather than alleges or demonstrates, a causal link between these general practices and any disparate impact. Wards Cove and Watson expressly require a plaintiff to allege and establish causation to survive a summary judgment motion. 109 S. Ct. at 2124-25; 108 S. Ct. at 2787-88. Plaintiff failed to provide any explanation of a causative link. Accordingly, plaintiff has not made out a claim of discriminatory disparate impact under Title VII.

C.

In her second count, Scales alleges that defendant retaliated against her for filing an EEO complaint. Scales states that she filed a discrimination charge with the Equal Employment Opportunity Commission on April 13, 1987.

Complaint at 1 60. She asserts that on June 30, 1987, Michael Tillman, her supervisor, issued a performance evaluation containing falsehoods and malicious accusations. She also asserts that Tillman awarded her a smaller salary increase than the increases awarded to her coworkers. In addition, Scales alleges that Tillman directed her to alter performance evaluations she had prepared for ANCs, offering irrational reasons for doing so. She further alleges that Tillman falsely identified problems on 5-South during her tenure as acting NUC, refused to provide her with the supervisory leadership and support she needed, and denied her the opportunity to attend divisional and departmental meetings important to her job performance.

Defendant moves to dismiss this claim, arguing that plaintiff has failed to establish a grima facie case of retaliation. To make out a claim of retaliation, plaintiff must show "(1) that she engaged in a statutorily protected activity; (2) that the employer took an adverse

employment action; and (3) that a causal connection existed between the two." See McKenna v. Weinberger, 729 F.2d 783, 790 (D.C. Cir. 1984); see also Barnes v. Small, 840 F.2d 972, 976(D.C. Cir. 1988). Defendant argues that, although plaintiff clearly established that she engaged in a statutorily protected activity, she failed to demonstrate that she suffered an adverse employment action. First, defendant contends that since the allegedly adverse employment evaluation shows that plaintiff was awarded the highest overall rating available, and that for all subsidiary categories, plaintiff was awarded either the highest or the next highest rating available, plaintiff's claim that the evaluation was prepared in retaliation must fail. However, defendant does not address plaintiff's claim that the performance evaluation contained falsehoods. Second, defendant asserts that plaintiff's claim that she received a lower pay raise than coworkers is not supported by the evidence. Defendant notes

that plaintiff received a raise while serving as acting NUC. When Cooley took the NUC position and plaintiff returned to her position as ANC, her salary was lowered to its previous rate. Defendant notes that subsequently, as ANC, plaintiff was given a 7% pay raise. Defendant contends that the average pay raise for ANC's eligible for a pay raise higher than 5% was 6.8% and that, therefore, plaintiff's claim that her raise was awarded in retaliation for filing of her EEO complaint is without merit. Furthermore, defendant asserts that plaintiff does not demonstrated any causal relationship between her filing of a discrimination charge and any employment action. However, the court in McKenna found that the plaintiff there had made out a Drima facie case where the only evidence of causation indicated that the employer was aware of the protected activity and the adverse action followed closely on its heels. 729 F.2d at 791. Therefore, plaintiff's claim of retaliation

cannot be disposed of on summary judgment for failure to establish causation here.

Defendant does not address plaintiff's claims that Tillman directed her to alter performance evaluations, that he falsely identified problems on 5-South, that he refused to provide her with supervisory leadership and support, and that he denied her the opportunity to attend divisional and departmental meetings. Moreover, plaintiff failed to address in her opposition to defendant's motion any aspect of defendant's motion for summary judgment on count two, nor does defendant discuss plaintiff's failure to oppose the motion in its reply to the opposition. Since defendant did not address these additional claims of retaliatory acts, defendant's motion for summary judgment with respect to plaintiff's claims of retaliatory action stemming from these alleged retaliatory acts must be denied.

D.

In her third count, Scales alleges a violation of 42 U.S.C. § 1981. Scales claims that defendant discriminated against her by denying her a new employment contract when it failed to select her for promotion. In count four, Scales alleges that the retaliation alleged in count two violated § 1981 as well. In its motion for partial summary judgment, defendant argues that the promotion plaintiff sought, from ANC to NUC, did not involve the denial of a new employment contract. The Supreme Court stated in Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2373 (1989) that "postformation conduct unrelated to an employee's right to enforce her contract . . ." could not violate § 1981. Moreover, the Court stated:

> The question of whether a promotion claim is actionable under § 1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer.

Id. at 2377. Copies of job descriptions of the ANC position and the NUC position show that, while an NUC is responsible for more supervisory duties than an ANC, the responsibilities of an ANC and a NUC are substantially similar. See Affidavit of Sheila A. McCarthy, exhibits A and B. There is no indication that a promotion to NUC would create "a new and distinct relation between the employee and the employer . . ." Patterson, 109 S. Ct. at 2377. See also Byrd v. Pyle, 728 F. Supp. 1, 2-3 (D.D.C. 1989).

Scales' claim that defendant's alleged retaliation against her violated § 1981 also cannot succeed. The alleged retaliatory acts did not relate to the formation or enforcement of a contract, and are thus not actionable under § 1981 pursuant to Patterson. See. ego, Chambers v. Southwestern Bell Telephone Co., 917 F.2d 5, 7 (Sth Cir. 1990); see also Lytle v. Household Mfg., Inc., 110 S.Ct. 1331, 1339 (1990) (O'Connor, J., concurring). Accordingly, defendant's motion for summary judgment on

Scales' § 1981 claims in counts three and four will be granted.

E.

In counts five through nine, plaintiff alleges numerous common law claims, each stemming from the same alleged discrimination that gave rise to the Title VII claim. Defendant argues that counts five through eight fail to state a cause of action under District of Columbia law. Moreover, defendant notes that the Court's jurisdiction over pendant state claims is discretionary. A trial court's decision to decline jurisdiction over pendant state law claims that are related to a Title VII claim has been upheld as appropriate in this circuit, especially when the relief sought under the pendant claims is substantially broader than the equitable relief available under Title VII. See Bouchet v. National Urban League. Inc., 730 F.2d 799, 805-06 (D.C. Cir. 1984). In counts five through nine, Scales seeks compensatory and punitive damages totalling $29 million. She has

not quantified her request for lost wages and back pay under Title VII. However, the pendant requests for $29 million dwarf any possible claim for monetary damages she could make under Title VII. Therefore, and because of the relative merit of counts five through nine and defendant's arguments for dismissal of counts five through eight, on authority of 8Ouchet, defendant's motion for summary judgment on the pendant claims alleged in counts five through nine will be granted.

For the reasons stated herein, an accompanying Order denies defendant's Supplemental Motion for Summary Judgment on the disparate treatment claim in count one, grants defendant's motion on the disparate impact claim in count one, denies defendant's motion on plaintiff's claim for retaliation in count two, and grants defendant's Motion for Partial Summary Judgment on counts three through nine.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED MARCH 25, 1991

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

DEBORAH QUICK SCALES
Plaintiff

v.

THE GEORGE WASHINGTON UNIVERSITY
Defendant

Civil Action No. 89-0796-LFO

ORDER

For the reasons stated in the accompanying Memorandum, it is this 22nd day of March, 1991, hereby

ORDERED: that defendant's Supplemental Motion for Summary Judgment is hereby DENIED as to plaintiff's disparate treatment claim alleged in count one, GRANTED as to plaintiff's disparate impact claim alleged in count one, and DENIED as to plaintiff's claim of retaliation alleged in count two; and it is further

ORDERED: that defendant's Motion for Partial Summary Judgment is hereby GRANTED; and it is further

ORDERED: that judgment shall be entered for defendant on counts three through nine.

UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED NOVEMBER 18, 1991
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

DEBORAH QUICK SCALES
Plaintiff

v.

THE GEORGE WASHINGTON UNIVERSITY
Defendant

Civil Action No. 89-0796-LFO

MEMORANDUM

On March 25, 1991, the Court granted summary judgment in favor of defendant on plaintiff's section 1981 counts (III and IV) and on all of her common law counts (V through IX). In addition, summary judgment was granted on plaintiff's disparate impact claim under Title VII. On April 8, 1991 plaintiff filed a motion requesting reconsideration of the Order granting partial summary judgment. For the reasons discussed below, an accompanying Order: denies plaintiff's motion for reconsideration with

respect to counts III and IV and the disparate impact claim reaffirms the Order granting defendant's dispositive motion on counts V, VI, VIII and IX; vacates the Order granting defendant's motion on count VII; and denies defendant's motion on this count.

Defendant's Supplemental Motion for Summary Judgment on plaintiff's disparate impact claim was granted because plaintiff "assumes, rather than alleges or demonstrates, a causal link between the[] general practices [alleged] and any disparate impact." Memorandum of March 25, 1991 [hereinafter Memorandum at 6. In her motion for reconsideration, plaintiff simply restates earlier unsuccessful arguments. On the section 1981 counts, plaintiff claims the Court relied on a nonexistent deposition transcript of Michael Tillman, plaintiff's supervisor, and the affidavit of Sheila McCarthy, whose credibility she questions, to conclude that "[t]here is no indication that a promotion to NUC [Nursing Unit Coordinator] would create 'a new and distinct

relation between the employee and employer . . . ."' Motion for Expedited Reconsideration at 4 (quoting Memorandum at 10). This is simply incorrect. The Memorandum did not rely on either affidavit in its discussion of the section 1981 counts.[1] There is no reference to Michael Tillman's deposition and the only reference to the Sheila McCarthy's deposition was to the "[c]opies of job descriptions of the ANC [Assistant Nurse Coordinator] position and the NUC position" that were attached as exhibits to the deposition. Memorandum at 10. Accordingly, plaintiff's motion for reconsideration with respect to these claims is denied.

II

Plaintiff also challenges the Court's exercise of its discretionary authority in

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[1]The Memorandum does refer to Michael Tillman's deposition testimony in the section that denies defendant's motion for summary judgement on the question of whether defendant intentionally discriminated against plaintiff; however, this section is not at issue here. See Memorandum at 5.

dismissing her pendant common law claims alleged in counts V through IX of the complaint. Plaintiff points out, correctly, that the original complaint alleged diversity of citizenship and $10,000[2] in controversy, providing these claims with an independent basis of jurisdiction. The claims, therefore, are not pendant and there is no discretionary authority to dismiss them. Defendant's counsel, overlooking the diversity allegation in the complaint, had moved for summary judgment on the common law counts on the theory that they were pendant. Plaintiff failed to raise the diversity basis of jurisdiction in her opposition to defendant's motion for summary judgment and the

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[2]The Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, §201(a), 102 Stat. 4646, enacted November 19, 1988, amended 28 U.S.C. §1332 (a) to raise the jurisdictional amount from $10,000 to $50,000. By the terms of the Act, the revision took effect on or after the 180th day after the enactment, or approximately May 18, 1989. See Commentary on the 1988 Revision, Davis D. Siegel, 28 U.S.C.A. §1332, (West Supp. 1990), at 4. Consequently, the relevant jurisdictional amount pertaining to plaintiff's claims remains $10,000.

Court ruled on the issue so drawn without referring sua sponte to the complaint (although jurisdiction is an issue which can be resolved sua sponte). The Court, however, did not rely exclusively on its discretionary authority to dismiss pendant claims in disposing of plaintiff's common law counts.

The March 25, 1991 Memorandum identified three grounds for granting defendant's Motion for Partial Summary Judgment on these counts: the court's discretionary authority to deny pendant state claims; the relative merits of the counts; and defendant's arguments for dismissal. Memorandum at 11. The court granted defendant's motion for summary judgment on the merits as well as on jurisdictional grounds. Nevertheless, in light of the oversights by all concerned it is necessary to address more fully the merits of defendant's challenge to the common law counts. Accordingly, the court will treat plaintiff's Motion for Expedited Reconsideration based on diversity alone as a general request for

reconsideration.

Count V of plaintiff's complaint asserts a claim for constructive discharge on the theory that defendant subjected her to such intolerable working conditions that she was forced to resign. However, in the District of Columbia "an employment contract of indefinite duration may be terminated for any reason by any party." Hall v. Ford, 856 F.2d 255 (D.C. Cir. 1988). Although the District of Columbia Court of Appeals has recently created a public policy exception to the at-will employment doctrine "when the sole reason for the discharge is the employee's refusal to violate the law," the Court emphasized that this is a "very narrow exception." Adams v. George W. Cochran & Co. Inc., No. 89-374, slip op. at 8 (decided September 17, 1991). In fact, the Court, following the Texas Supreme Court, noted that the exception does not extend to an employee discharged for reporting the illegal activities of other employees to his employer because the

employee "'was not forced to choose between risking criminal liability [and] being discharged from his livelihood."' Id. (quoting Winters v. Houston Chronicle Publishing Co., 795 S.W.2d 723, 724 (Tex. 1990)). See also Sorrells v. Garfinckel's Brooks Brothers Miller & Rhoads Inc., 565 A.2d 285, 289 (D.C.App. 1989), Ivy v. Army Times Publishing Co., 428 A.2d 831 (D.C.App. 1981)(en banc). Since the Court of Appeals did not extend this limited exception to unlawful acts by an employer, plaintiff's claim of constructive discharge is barred by the general at-will employment doctrine.

Plaintiff relies on Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981), to support her constructive discharge claim. This reliance, however, is misplaced. Clark specifically addressed constructive discharge in the Title VII context. Id. at 1173. The question on appeal involved the propriety of a backpay award under Title VII for the period of time following the plaintiff's resignation. See id. at 1172-77. The

United States court of Appeals did not purport to address District of Columbia law. Therefore, plaintiff has identified no legal basis for her position.

Instead, plaintiff claims as a matter of fact that, given her twenty-year employment by defendant, she was not an at-will employee. However, beyond her conclusory assertion that an employee of twenty years cannot be terminable at-will, plaintiff has offered no evidence to support her contention that she was not an at-will employee -- i.e., that a contract existed, either express or implied, for a fixed period of employment. In Littell v. Evening Star Newspaper Co., 120 F.2d 36, 37 (D.C. Cir. 1941), plaintiff was hired by defendant to develop an advertising sales plan. After a failed attempt, she successfully developed a plan that was adopted by the defendant and she was hired on a "permanent" basis. Id. She continued to work for defendant for a "number of years," during which plaintiff's plan was implemented by defendant

and became very profitable. Id. On these facts, the Court of Appeals ruled that Littell was an at-will employee and enunciated the standard for at-will employment, which is still the law in the District of Columbia: "The rule is that unless the parties reveal an intent to enter into a contract for permanent employment, it will be regarded as terminable." In its opinion, the Court observed

> that where no such intent is clearly expressed, and absent evidence which shows other consideration than a promise to render services, the assumption will be that -- even though they speak in terms of "permanent" employment -- the parties have in mind merely the ordinary business contract for continuing employment, terminable at the will of either party.

Id. Plaintiff need not establish an exact period of time over which it was agreed the contract

would be in force, but simply produce some other evidence that the parties intended the relationship to be permanent, even if indefinite. See Hodae v. Evans Financial Corp., 707 F.2d 1566 (D.C. Cir. 1983)(employee who left job in another city, relocated family, and accepted lower compensation based on defendant's representation of "permanent employment"--i.e., that plaintiff was "entitled to stay on unless the circumstances within the company have changed"--not at-will). However, an extended period of employment absent other factors evidencing the parties' intent -- e.a., "express terms of the contract, evidence of surrounding circumstances, or the existence of additional consideration," id. at 1569, -- does not transform an at-will arrangement into permanent employment. Cf. Schoen v. Consumers United Group. Inc., 670 F. Supp. 367 (D.D.C. 1986)(14 years), Smith v. Chamber of Commerce, 645 F. Supp. 604 (D.D.C. 1986)(17 or 18 years).

This presumption that a hiring unaccompanied by an expression of time or conditions of employment is at-will, is rebuttable by circumstantial evidence, gleaned from the facts and circumstances of the case and the conduct of the parties, that the parties originally intended employment to be for some measurable duration. See Sullivan v. Heritage Foundation, 399 A.2d 856, 860 (D.C. 19798(even employees who left prior employment on representation that defendant's by-laws set annual contracts are employed at will). Plaintiff proffers no such evidence. See, e.a., Transcript of December 11, 1990 Motion's Hearing at 49-52, Plaintiff's Pretrial Statement at 22-25, Plaintiff's Opposition to Defendant's Motion for Partial Summary Judgment at 19-21; Statement of Genuine Issues of Material Fact Which the Record Supports and the Plaintiff Contends Need to be Litigated at 19-20. "More than conclusive allegations in the pleadings or appellants' belief in the permanence of

employment are necessary to raise a material issue of fact precluding the grant of summary judgment." Sullivan, 399 A.2d at 859. Here the undisputed facts and applicable District of Columbia law require the conclusion that she was an at-will employee. Accordingly, the Order granting defendant's motion for summary judgment on this issue is reaffirmed.

Plaintiff asserts that her employment contract with defendant "contain[ed] an implied-in-law provision that the plaintiff would not be subjected to intentional discrimination because of her race and in violation of, inter alia, the statutes on which Counts I through IV, hereinabove, are predicated." Complaint at 40. Counts I through IV are based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et. sex, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. Plaintiff does not point to any authority to support her claim that Title VII and section 1981 create common law causes of action for

breach of contract.

In a recent opinion, Judge Hogan discussed the danger of incorporating into employment contracts, by implication, provisions of statutes which do not prescribe such incorporation, saying:

> If the Court were to read an implied contract into the terms of the Mental Health Services Act, there is no reason why every statute that grants a right should not be read that way. The effect would be widespread--hundreds of statutes would be interpreted to create legally enforceable contract rights.

Russell v. District of Columbia, 747 F. Supp. 72, 79 (D.D.C. 1990). Although Judge Hogan addressed a different statutory scheme, his reasoning is equally applicable here. Since plaintiff has failed to provide any indication that Congress intended Title VII or section 1981 to create common law contract rights, the Order

granting defendant's motion for summary judgment on this issue is likewise reaffirmed.

Plaintiff also alleges that defendant engaged in fraudulent activity. In particular, plaintiff claims that defendant falsely represented itself as an equal opportunity employer, when in fact, plaintiff alleges, it was not. Plaintiff claims that her reliance on these statements resulted in lost opportunities for career advancement and caused her to apply for the promotion to the NUC position, which precipitated this law suit. On re-examination of the pleadings and other filings in this case, it appears defendant has failed to establish that plaintiff's fraud claim is deficient as a matter of law. Accordingly, defendant's motion for summary judgment on count VII of the complaint is denied without prejudice. Defendant may rebrief this issue, allowing adequate time under the Local Rules for plaintiff to respond, prior to the pretrial conference.

D.

Next, plaintiff alleges that defendant breached an implied covenant of good faith and fair dealing. Complaint at 42-43. However, the District of Columbia does not recognize such a cause of action. See Minihan v. American Pharmaceutical Association, 812 F.2d 726, 729 n.2 (D.C. Cir. 1987); Downey v. Firestone Tire & Rubber Company, 630 F. Supp. 676 (D.D.C. 1986); IVY v. Arms Times Pub. Co., 428 A.2d 831 (D.C. 1981). In her pretrial statement, plaintiff claims that "[p]urely for the purposes of judicial economy of time and resources, the plaintiff hereby dismisses her eighth cause of action. . . ." Id. at 34. Treating this as a motion to dismiss count VIII of the complaint, it is granted with prejudice.

E.

Finally, plaintiff asserts a claim for intentional infliction of emotional distress. To prevail on such a claim, plaintiff must show that "extreme and outrageous" conduct on the

part of the defendant caused her "severe emotional distress." See Sere v. Group Hospitalization. Inc., 443 A.2d 33, 37 (D.C. App.) (quoting **Restatement (Second) of Torts §** 46 (1965)), cert. denied, 459 U.S. 912 (1982). The law, however, does not impose liability for all conduct causing mental distress. The conduct must be "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency."' District of Columbia v. Thompson, 570 A.2d 277, 290 (D.C. App. 1990) (quoting Jackson v. District of Columbia, 412 A.2d 948, 957 (D.C. App. 1980) (quoting **Restatement (Second) of Torts** § 46 comment d (1965), cert. denied, 60 U.S.L.W. 3342 (1991). Although defendant's conduct, absent any racial animus would not rise to this level as a matter of law, the District of Columbia Court of Appeals recognizes a public policy exception for

conduct that offends the D.C. Human Rights Act.[3] It is unnecessary, however, to decide whether the wrongful act alleged is assault, battery, or libel. Hunter v. The District of Columbia, No. 88-7265 (decided August 30, 1991). Likewise, if the wrongful acts alleged by plaintiff violate

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[3]Compare District of Columbia v. Thompson, 570 A.2d 277, 290 (D.C. App. 90) (Court held the following conduct by supervisor not sufficiently outrageous to warrant recover: "[he] criticized her in memorandum after memorandum; he approved her leave and then changed here status to absent without leave; he refused to consider her for promotion to the next grade level or to give her the computer test she asked for; he isolated her from other employees; he requested statements from her doctor as to her limited hours; he wrote memoranda on her excessive leave; and he assaulted her and lied about it, resulting in her job loss") with Howard University v. Best, 484 A.2d 958, 986 (D.C. App. 1984) ("[a]ctions which violate public policy [e.g.], the D.C. Human Rights Act] may constitute outrageous conduct sufficient to state a cause of action for infliction of emotional distress:). See also id. at 986 ("employer-employee conflicts do not, as a matter of law, rise to the level of outrageous conduct"); Hogan v. Forsyth Country Club, Co., 340 S.E.2d 116, 122-123 (N.C. 1986) (supervisor's screaming and shouting at an employee, calling her names, interfering with her supervision of subordinates, throwing menus at her, and finally firing her not extreme and outrageous conduct) (quoted in District of Columbia v. Thompson, 570 A.2ds 277, 290-291 (D.C. 1990)).

the D.C. Human Rights Act, then the one-year period of limitation for this Act would apply and not the three-year residuary period. See D.C. Code § 1-2544, Prouty v. National R.R. Passenger Corp., 572 F. Supp. 200 (D.D.C. 1983). Neither plaintiff's complaint nor her other pleadings alleges facts or proffers evidence that defendant intentionally caused her emotional distress by conduct "independent" of the alleged violations of Title VII and section 1981, and ostensibly the D.C. Human Rights Act. Hunter, slip op. at 3 (quoting Sanders, 580 A.2d at 665). Therefore, the one-year statute of limitation applicable to claims under this Act applies to plaintiff's claim. Since the last discriminatory act plaintiff alleges occurred in November of 1987 -- i.e>, her constructive discharge -- and the complaint was filed in

March of 1989, sixteen months later, her emotional distress claim is time barred.

Date: November 15, 1991

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED NOVEMBER 18, 1991
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

DEBORAH QUICK SCALES
Plaintiff

v.

THE GEORGE WASHINGTON UNIVERSITY
Defendant

Civil Action No. 89-0796-LFO

ORDER

For the reasons stated in the accompanying memorandum, it is this 15th days of November, 1991, hereby

ORDERED: that plaintiff's Motion for Expedited Reconsideration of counts III and IV of the complaint and the disparate impact claim is DENIED; and it is further

ORDERED: that the portion of the March 25, 1991 Memorandum and Order granting defendant's dispositive motion on counts V, VI, VIII and IX of plaintiff's complaint is REAFFIRMED; and it is further

ORDERED: that the portion of the March 25, 1991 Memorandum and Order granting defendant's dispositive motion on count VII of the complaint is VACATED; and it is further

ORDERED: that defendant's dispositive motion on count VII is DENIED without prejudice; and it is further

ORDERED: that defendant may file a supplemental motion on count VII, allowing adequate time under the Local Rules for plaintiff to respond, prior to the pretrial conference.

UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED AUGUST 21, 1992
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

DEBORAH QUICK SCALES
Plaintiff

v.

THE GEORGE WASHINGTON UNIVERSITY
Defendant

Civil Action No. 89-0796-LFO

MEMORANDUM

This matter is before the Court on defendant's second supplemental motion for summary judgment. Plaintiff, a former employee of the George Washington University Medical Center, filed a nine count complaint against defendant on March 27, 1989, seeking relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2003, et seou (Counts I and II); the Civil Rights Act of 1866, 42 U.S.C. § 1981 (Counts III and IV); and five common law causes of action (Counts V through IX). On October 15, 1990, defendant filed a motion for partial

summary judgment relating to all of plaintiff's causes of action except those arising under Title VII and on January 11, 1991, plaintiff filed a supplemental motion for summary judgment on the Title VII claims. A March 25, 1991 Order dismissed the Title VII disparate impact claim, the 42 U.S.C. § 1981 claims, and all of the common law causes of action, leaving only the Title VII disparate treatment claim under Count I and the Title VII retaliation claim under Count II.

On April 8, 1991, plaintiff filed a motion requesting reconsideration of the grant of partial summary judgment. A November 18, 1991 Order granted plaintiff's motion only with respect to Count VII, her common law fraud claim, denied plaintiff's motion in all other respects, and invited defendant to file a supplemental motion addressing the fraud count. Defendant filed a motion for summary judgment as to the remaining common law count and plaintiff filed an opposition. For the reasons stated

below, an accompanying Order will grant defendant's motion for summary judgment and dismiss plaintiff's common law fraud claim.[1]

I.

The facts of this case are set out in the November 18, 1991 Memorandum and only a few relevant facts bear repeating here. Plaintiff was hired by defendant's medical center on October 3, 1966, as a Licensed Practical Nurse. Over the course of her employment with defendant prior to 1985 she applied for several promotions: some she received, others she did not. See Scales Deposition at 142-52. In 1986 the position of Nursing Unit Coordinator for plaintiff's unit became vacant. Plaintiff was named Acting Nursing Unit Coordinator in October

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[1] Plaintiff also filed a second motion for reconsideration, requesting reinstatement of the section 1981 and the Title VII disparate impact portions of her complaint in light of the passage of the Civil Rights Act of 1991. Since our Court of Appeals has already heard argument, but has not yet ruled, on the retroactive application of the Civil Rights Act of 1991, the accompanying Order will stay consideration of plaintiff's motion.

1986 and she formally applied for the permanent position by letter dated October 28, 1985. Plaintiff was not offered the position. Instead it was offered to Joan K. Michaels. Ms. Michaels declined the offer and the position was readvertised in the Washington Post in February and March of 1987. The position was then offered to Ann Cooley in March 1987. On November 24, 1987, plaintiff tendered her resignation, which became effective on December 8, 1987.

II.

The essential elements of common law fraud are: (1) a false representation (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) with intent to deceive, and (5) action is taken in reliance on the representation. Bennett v. Kiaains, 377 A.2d 57, 59 (D.C. 1977), cert. denied, 434 U.S. 1034 (1978). To withstand defendant's motion for summary judgment, plaintiff must demonstrate the existence of disputed material facts as to each of these five elements. See Celotex v. Corn. v.

Catrett, 477 U.S. 317 (1986). The burden of proof for a claim sounding in fraud is even greater, requiring proof "by clear and convincing evidence, which is not equally consistent with either honesty or deceit." Bennett v. Kiaqins, 377 A.2d at 59.

Plaintiff's fraud claim has two components. First, she claims she relied on defendant's assertions that it was an equal opportunity employer in remaining at the University throughout the time that she was employed there, resulting in lost opportunities for career advancement. Second, plaintiff claims that she specifically applied for the position of Nursing Unit Coordinator in 1986 in reliance on these representations.

A.

With respect to the second element, plaintiff claims she applied for the Nursing Unit Coordinator position based on defendant's representations that it was an equal opportunity employer. In her opposition to defendant's

motion for summary judgment, plaintiff claims that she "trusted her employer completely without any suspicion that she was being discriminated against because of her race." Defendant's Opposition to Plaintiff's Second Supplemental Motion for Summary Judgment at 56. However, plaintiff's allegations that she was not aware of the alleged discrimination by defendant's medical center until she applied and was rejected for the Nursing Unit Coordinator position are not supported by her own deposition testimony.

Plaintiff testified that from 1974 to 1984 she had conversations her supervisor, Nursing Unit Coordinator Edna Hamilton, in which

> she would always tell [plaintiff] about the problems she was having because she was black and how . . . [plaintiff] as a black staff nurse . . . would have to do or work twice as hard in order to better [her]self or to do better in whatever profession [she] took. . . . [O]ver the period of time she did refer to the fact that being black, you just had to work harder and it was a big problem.

Scales Deposition at 156. With respect to defendant's medical center in particular, plaintiff testified that Ms. Hamilton told her

> that because [plaintiff was] black, [she] would have to work harder if [she] wanted a promotion, [she] would have to do better on the unit, [she] would have to exceed in [her] evaluation, [she] would have to excel in [her] performance in order to get promotions, or what have you.

Id. at 157. Hamilton also told plaintiff that she "would have to perform better than [her] white counterparts in order to better [her]self, in order to get the promotion." Ids Finally, plaintiff testified that in July of 1984 she received a performance appraisal that she felt was "unfair" and was motivated by "racial animus." Id. at 157-61. Plaintiff proffered no probative evidence to the contrary.

This uncontroverted testimony, out of plaintiff's own mouth, establishes that regardless of what plaintiff may have believed regarding defendant's assertions that it was an equal opportunity employer when she was hired in

1966, at some time between 1974 and 1984, and certainly no later than July of 1984, plaintiff was not acting or forebearing in reliance on such assertions. Without reliance, plaintiff cannot establish her claim that defendant's representations that it was an equal opportunity employer was a material factor in her decision to apply for the Nursing Unit Coordinator position in 1986. See Hercules & Co. v. Shama Restaurant Corp., 566 A.2d 31, 39 n.16 (D.C. App. 1989).

B.

Plaintiff filed her complaint on March 27, 1989. Since the remaining allegations of fraud occurred prior to March 27, 1986, plaintiff's claim is governed by the three years statute of limitations. See D.C. Code § 12-301(8). Plaintiff argues that the statute of limitations was tolled by defendant's fraudulent concealment of its discriminatory practices. "The doctrine of fraudulent concealment applies only when the defendant does 'something of an affirmative

nature designed to prevent discovery of the cause of action."' Woodruff v. McConkey, 524 A.2d 722 (D.C. App. 1987)(citing William J. Davis. Inc. v. Young 412 A.2d 1187, 1191, 1192 (D.C. App. 1980)). Plaintiff has failed to allege any such affirmative concealment by defendant. Moreover, "a well established defense to a claim of fraudulent concealment is that the plaintiff knew, or by the exercise of due diligence could have known, that [s]he may have had a cause of action." Estate of Chappelle v. Sanders, 442 A.2d 157, 158 (D.C. App. 1982)(citing Weisberq v. Williams. Connells & Califano, 390 A.2d 992 (D.C.App. 1978). Plaintiff had conversations with Ms. Hamilton which revealed defendant's alleged discriminatory practices as early as 1974. Hamilton was plaintiff's supervisor and Nursing Unit Coordinator and it is reasonable to infer that Hamilton had apparent authority vis a vis plaintiff to make representations on behalf of defendant. In addition, plaintiff was

necessarily aware of any decisions or actions adverse to her contemporaneously with their being made. Thus, it is apparent and beyond material dispute that plaintiff knew, or by the exercise of due diligence could have known, that she had a cause of action more than three years before she filed the Complaint.

Plaintiff argues that she was unaware of the discrimination around her until after her second rejection for the Nursing Unit Coordinator position because outside work she was "'in a very insulated environment."' Defendant's Opposition at 6 (quoting Deposition of Lennox E. Joseph, Ph.D. at 72-73). But the fact that she was unaware of some of the discrimination allegedly practiced by defendant, or the full extent of it, does not overcome the uncontroverted direct evidence that her supervisor, Ms. Hamilton, advised plaintiff of specific discrimination in her work environment more than three years before plaintiff filed this suit. This undisputed fact defeats any

claim of fraudulent concealment sufficient to toll the statute of limitations.

Date: August 21, 1992

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED AUGUST 21, 1992
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

DEBORAH QUICK SCALES
Plaintiff

v.

THE GEORGE WASHINGTON UNIVERSITY
Defendant

Civil Action No. 89-0796-LFO

ORDER

For the reasons stated in the accompanying Memorandum, it is this 20th day of August, 1992, hereby

ORDERED: that defendant's motion to dismiss is GRANTED; and it is further

ORDERED: that Count VII of the complaint is DISMISSED; and it is further

ORDERED: that consideration of plaintiff's second motion for reconsideration is stayed until the Court of Appeals for the District of

Columbia rules on the retroactive application of the Civil Rights Act of 1991.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED FEBRUARY 9, 1993
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

DEBORAH QUICK SCALES
Plaintiff

v.

THE GEORGE WASHINGTON UNIVERSITY
Defendant

Civil Action No. 89-0796-LFO

MEMORANDUM

This matter is before the Court on plaintiff's "Motion For Reinstatement of Counts III, IV and the Disparate Impact Portion of Her Complaint," and plaintiff's "Supplemental Motion For Reconsideration of the Order Filed August 21, 1992 Dismissing Plaintiff's Seventh Count."

Plaintiff, a former employee of the George Washington University Medical Center, filed a nine-count complaint against defendant seeking relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et sect, the Civil Rights Act of 1866, 42 U.S.C. § 1981, and five

common law causes of action. The facts and procedural background of this case are set out in Memoranda filed on March 25, 1991, November 18, 1991, and August 21, 1992. All of plaintiff's claims have been dismissed on motions for summary judgment with the exception of the disparate treatment and retaliation claims under Title VII alleged in Counts I and II.

I.

In the first of the motions presently before the Court, plaintiff seeks reinstatement of her Title VII disparate impact claims and her § 1981 claims. These claims were dismissed on March 25, 1991 for the reasons stated in the Memorandum filed on that date. Plaintiff's first motion for reconsideration was denied on November 18, 1991. Consideration of the present motion, which seeks reconsideration a second time, was stayed on August 21, 1992 pending a ruling by the Court of Appeals on the retroactive application of the Civil Rights Act

of 1991. See Memorandum at 2 n.1 (Aug. 21, 1992).

Plaintiff's § 1981 claims were dismissed on the authority of Patterson v. McLean Credit Union, 491 U.S. 164 (1989). Plaintiff argues that the § 1981 claims should be reinstated because Patterson has been overruled by the Civil Rights Act of 1991. Plaintiff's argument is foreclosed by the Court of Appeals' decision in Gersman v. Group Health Ass'n. Inc., 975 F.2d 886, 900 (D.C. Cir. 1992), which held that the "substantive" provisions of the Civil Rights Act of 1991 do not apply retroactively. The fact that the conduct at issue here occurred before the Patterson decision is "of no legal effect." Ids at 899.

The same fate befalls plaintiff's disparate impact claims. Those claims failed to meet the requirements articulated in Wards Cove Packing Co. v. Atonio, 490 U.S. 2115 (1989), which has also been overruled by the Civil Rights Act of 1991. The relevant amendments here are clearly

substantive, and therefore cannot save plaintiff's claims under Gersman. Plaintiff's further arguments fail to overcome the original basis for dismissal of the disparate impact claims: plaintiff has failed to show specific employment practices causally linked to any disparate impact upon her. See Memorandum at 5-7 (March 25, 1991); Memorandum at 1-2 (Nov. 18, 1991).

For these reasons, plaintiff's Motion For Reinstatement of Counts III, IV and the Disparate Impact Portion of Her Complaint will be denied.

II.

Plaintiff's second motion seeks reinstatement of Count VII, a common law claim for fraud, which was dismissed on August 21, 1992. As explained in the Memorandum filed on that date, the five elements of common law fraud are: (1) a false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) with intent to

deceive, and (5) action is taken in reliance on the representation. Bennett v. Kiaqins, 377 A.2d 57, 59 (D.C. 1977), cert. denied, 434 U.S. 1034 (1978). Plaintiff claims that she relied on defendant's representations that it was an equal opportunity employer in remaining at the University and in applying for the position of Nursing Unit Coordinator.

In the August 21, 1992 Memorandum, the second and fifth elements of fraud were found lacking for purposes of surviving defendant's motion for summary judgment. In her deposition, plaintiff testified that from 1974 to 1984 she had conversations with her supervisor, Nursing Unit Coordinator Edna Hamilton, in which Hamilton "would always tell me about the problems she was having because she was black and how . . . I as a black staff nurse . . . would have to do or work twice as hard in order to better myself or to do better . . . ." Scales

Dep. at 155. Such statements reveal that

> regardless of what plaintiff may have believed regarding defendant's assertions that it was an equal opportunity employer when she was hired in 1966, at some time between 1974 and 1984, and certainly no later than July of 1984, plaintiff was not acting or forebearing in reliance on such assertions.

Memorandum at 5 (Aug. 21, 1992).

In the present motion for reconsideration, plaintiff raises several objections to this conclusion. First, plaintiff suggests that the statements made by Hamilton were made only recently. But plaintiff's testimony clearly states that the discussions occurred "[o]ver the course of [her] employment with" Hamilton, which lasted only to 1984.[1] Second, plaintiff suggests that Hamilton's statements were merely general statements not specifically directed at the University. Plaintiff's suggestion is belied by her deposition testimony. A careful

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[1]In addition, plaintiff testified to a July 1984 performance evaluation that she believed at the time was "unfair" because of "racial animus." Scales Dep. at 157-60. Thus, plaintiff believed by 1984 not only that the University discriminated on the basis of race, but that the University had discriminated against her on the basis of race.

examination of that testimony reveals that the discussions of racial discrimination were, at least in part, specifically focused on the University.[2]

Plaintiff argues finally, and most vigorously, that the statements from her deposition were nothing more than an expression of a viewpoint fundamental to her cultural heritage and values as a Black American. She attaches affidavits explaining this point and purporting to reconcile the disputed statements with the contention that she relied on defendant's representations that it was an equal opportunity employer. There are several responses to plaintiff's argument. First, when read in context, it is clear that at least some

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[2]For example, defense counsel asked plaintiff: "What specific problems at the University did [Hamilton] discuss with you?" Plaintiff responded: "She discussed the problem that because I'm black, I would have to work harder, if I wanted a promotion, I would have to do better on the Unit . . . ." Defense counsel proceeded to inquire: "Did she tell you that you would have to perform better than the whites within your unit for her to give you a better evaluation?" Plaintiff responded: "She told me that I would have to perform better than my white counterparts in order to better myself, in order to get the promotion." Scales Dep. 156-57; see also supra note 1.

of the statements in plaintiff's deposition do reveal her awareness of discrimination at the University (and, in fact, affecting her). To the extent that plaintiff now attempts to contradict that conclusion in her newly filed affidavits, such an effort to create a genuine issue of fact must fail. Pyramid Securities Ltd. v. IB Resolution. Inc., 924 F.2d 1114, 1123 (D.C. Cir. 1991). It is noteworthy in this regard that plaintiff reviewed her deposition testimony after giving it and declined to make any corrections to the passages at issue here, although she corrected other portions of her testimony. Any attempt to create a genuine issue of fact in this manner is particularly inappropriate on a motion for reconsideration, given that the recent affidavits were not presented in plaintiff's original opposition to defendant's motion for summary judgment on the fraud count.

Second, if the plaintiff's broader explanation of her deposition testimony does not contradict that testimony, it also does not establish a genuine issue of material fact as to the second and fifth elements of a fraud claim. Plaintiff's explanation conveys the idea that plaintiff, as a Black American, was always

taught that she had to work twice as hard as whites in order to advance equally. That proposition implies a belief that discrimination is ubiquitous in our society, and such a belief tends to undermine an assertion of reliance on any institution's representation that it is an equal opportunity employer. In any event, plaintiff fails to undermine in a credible manner the evidence that she was made aware of discrimination at the University.

Finally, even if plaintiff had shown that genuine issues of material fact exist as to the second and fifth elements of fraud, the instant motion would have to be denied on separate grounds. Plaintiff has also failed to meet her burden under Celotex Corp. v. Catrett, 477 U.S. 321 (1986), of demonstrating disputed facts as to the third and fourth elements of fraud. Plaintiff has not presented evidence showing that defendant's representations that it was an equal opportunity employer were made with knowledge of their falsity or with the intent to deceive.

Accordingly, plaintiff's Supplemental Motion For Reconsideration of the Order Filed August 21, 1992 Dismissing Plaintiff's Seventh Count will be denied.

III.

One final point deserves brief mention. Plaintiff's filings with the Court contain repeated invocations of plaintiff's right to a trial by a jury of her peers "consisting of members of the plaintiff's race." Counsel for the plaintiff may wish to bear in mind the Supreme Court's admonition that a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of their race. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991).

* * * * *

For the foregoing reasons, it is this 8th day of February, 1993, hereby

ORDERED: that plaintiff's Motion For Reinstatement of Counts III, IV and the Disparate Impact Portion of Her Complaint should be, and is hereby, DENIED; and it is further

ORDERED: that plaintiff's Supplemental Motion For Reconsideration of the Order Filed August 21, 1992 Dismissing Plaintiff's Seventh Count should be, and is hereby, DENIED.

UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED JULY 27, 1993
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

DEBORAH QUICK SCALES
Plaintiff

v.

THE GEORGE WASHINGTON UNIVERSITY
Defendant

Civil Action No. 89-0796-LFO

MEMORANDUM

This action was brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e it sect, and was tried to the bench for twelve days from April 19, 1993 through May 5, 1993. In Count I, plaintiff alleges disparate treatment in connection with her nonselection for the position of Nursing Unit Coordinator at defendant's Medical Center. In Count II, she alleges unlawful retaliation for her filing of charges with the Equal Employment Opportunity

Commission (EEOC).[1]

After the close of plaintiff's case, counsel presented extensive arguments on defendant's motion for judgment pursuant to Federal Rule of Civil Procedure 52(c).[2] On the basis of the findings and for the reasons stated below, defendant's motion will be granted: the defendant failed to select plaintiff as a Nursing Unit Coordinator not as a result of intentional discrimination, but because both

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[1]Several additional claims raised in plaintiff's complaint were dismissed in previous rulings on summary judgement. See Memoranda and Orders dated March 25, 1991, November 18, 1991, August 21, 1992 & February 9, 1993.

[2]Effective 1991, Rule 52(c) replaced a portion of the former Rule 41(b), which authorized a dismissal at the close of the plaintiff's case if the plaintiff had failed to carry an essential burden of proof. See Advisory Committee Note to Fed. R. Civ. P. 52 (1991 Amendment). Rule 52(c) provides in relevant part: If during a trial without a jury a party has been fully head with respect to an issue and the court finds against the party on that issue, the court may enter judgement as a matter of law against that party on any claim . . . that cannot under the controlling law be maintained or defeated without a favorable finding on that issue . . . .

persons selected were better qualified for the job; nor has she carried her burden of proving that she was the victim of retaliation.

I. FINDINGS OF FACT

Plaintiff, a black female, was first hired by defendant's Medical Center in 1966 as a Licensed Practical Nurse I (LPN I). In 1972, plaintiff was promoted to Licensed Practical Nurse II (LPN II).

Plaintiff received an Associate of Arts degree in 1974. She was promoted to Staff Nurse I (SN I) in June of 1974, and to Staff Nurse II (SN II) in July of 1976.

In 1979, plaintiff received the degree of Bachelor of Science in Nursing. In 1981, she was promoted to Assistant Nurse Coordinator (ANC).

The position of Nursing Unit Coordinator (NUC) is equivalent to a Head Nurse position for a unit of a medical center or hospital. The position entails supervisory responsibility over all nurses on the unit.

In 1985, the NUC position for plaintiff's unit, 5-South, became vacant with the departure of Edna Hamilton, a black female. Janet Vickery, a white female, was appointed to the position of Acting NUC for 5-South. Plaintiff did not apply for the position of Acting NUC at that time. Shortly thereafter, Tammy Sparks-Jenet, a white female, was appointed to the permanent position of NUC for 5-South. Plaintiff did not apply for the permanent NUC position.

In 1985, the NUC position for plaintiff's unit, 5-South, became vacant with the departure of Edna Hamilton, a black female. Janet Vickery, a white female, was appointed to the position of Acting NUC for 5-South. Plaintiff did not Apply for the position of Acting NUC at that time. Shortly thereafter, Tammy Sparks-Jenet, white female, was appointed to the permanent position of NUC for 5-South. Plaintiff did not apply for the permanent NUC position.

In October 1986, the position of NUC for 5-South again became vacant when Tammy Sparks-Jenet was promoted to the position of Associate Director of Nursing.

Plaintiff formally applied for the permanent position of NUC for 5-South by letter dated October 28, 1986. Plaintiff was named Acting NUC for 5-South effective November 2, 1986.

When plaintiff applied for the NUC position, the principal decisionmaker charged with selecting an applicant for the position was Michael Tillman, a white male, who was then Associate Director of Nursing for defendant's Medical Center. Selection for the position was made in consultation with and with the approval of Sheila McCarthy, a white female, who was Director of Nursing for the Medical Center.

The factors considered by Tillman and McCarthy in filling the NUC position were: (1) education; (2) experience; and (3) performance during the interview process. In addition,

Tillman and McCarthy took into consideration the fact that 5-South was the largest unit in the Medical Center and historically had been a difficult unit to manage properly. As a result, they deemed it important to select an individual with strong management skills.

The minimum qualifications for the position of NUC were: (1) a Master's degree in Nursing or the equivalent combination of education and experience; (2) three years of current clinical experience in the particular clinical area; (3) at least one year of supervisory experience; and (4) current District of Columbia licensure as a Registered Nurse. Plaintiff met the minimum qualifications for the position of NUC.

Plaintiff was interviewed for the 5-South NUC position on November 20, November 21, November 24 and November 26, 1986. Plaintiff's interviews did not include a lunchtime interview with personnel in NUC positions of other units.

At the time of her interviews, plaintiff had served as an ANC for approximately 5 years

(from 1981 to 1986), and had served as Acting NUC for a few weeks.

At the time of her interviews, plaintiff had no credits toward a Master's degree and was not admitted into an M.S.N. program. She was, however, enrolled in a Personnel Management course at defendant's School of Continuing Education.[3]

Joan Michaels, a white female and outside applicant for the 5-South NUC position, was interviewed on November 10, 1986.

Michaels' interviews included a lunchtime interview with personnel in NUC positions of other units.

Michaels previously had been considered and rejected for the position of NUC for an oncology

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[3]During the early 1980's, defendant had established an M.S.N. program for its nurses in conjunction with Marymount University. In July 1987, after the 5-South NUC position was filled (as described infra), plaintiff was admitted into an M.S.N. program at Marymount University. She began taking courses there in September 1987.

unit (2-East) at the Medical Center in September 1986.

Michaels was recommended for the NUC position for 5-South by all of the interviewers with the exception of Gina Brooks. Brooks, a black female, recommended that the position be given to plaintiff. Tillman and McCarthy considered Michaels' performance in the interview process to be substantially superior to that of plaintiff. The interviewers gave Michaels "rave reviews" and considered her "dynamite," while most were "lukewarm" about plaintiff's performance in the interviews. Testimony of Tillman; accord Testimony of McCarthy.[4]

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[4]This testimony of Tillman and McCarthy was elicited in plaintiff's case, and, like the bulk of their testimony, was uncontradicted by any evidence offered by plaintiff.

Plaintiff's assertion that she performed very well during her interviews is not supported by any evidence in the record aside from her own personal opinion. Her opinion on this point is inherently unreliable as well as irrelevant. Gina Brooks, one of the interviewers, testified that she did not recall plaintiff's interview.

Michaels was within a semester of completing her M.S.N. degree, while plaintiff had not completed any credits toward an M.S.N. and had not been admitted into an M.S.N. program. Thus, Michaels' educational qualifications were substantially superior to those of plaintiff.

Michaels' work experience was also superior to that of plaintiff. In particular, Michaels had held the position of Head Nurse -- which is equivalent to the position of NUC -- at Sibley Memorial Hospital for three years. Plaintiff had been Acting NUC for only a few weeks.

On or about December 11, 1986, Michaels was offered the position of NUC for 5-South.[5] The decision of Tillman and McCarthy to offer the position to Michaels was based upon the determination that Michaels exceeded plaintiff

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[5]The statement by Gina Brooks that Michaels told her during her interview that she (Michaels) had been offered the position of NUC for 5-South is inadmissible hearsay and is stricken.

in all three categories of education, experience and interview performance.[6] The evidence shows that plaintiff's race did not play a part in the decision to offer the job to Michaels instead of plaintiff.

In mid-January 1987, Michaels turned down the position of NUC for 5-South.

Tillman subsequently decided to re-advertise the position rather than to allow

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[6]Plaintiff pointed to certain elements of the interview process as indicative of discriminatory animus. however, nondiscriminatory and credible explanations for each of the elements were provided by defendant's decisionmakers during plaintiff's case, and those explanations were essentially unrefuted. Thus, Michaels' and Cooley's interviews took place during a single day because they were outside candidates and such an arrangement was necessary to accommodate their schedules. The two outside candidates had lunchtime interviews for the same because of Tillman's desire to avoid a "popularity contest" judged by the internal candidate's peers. Finally, Tillman's directives to the interviewers to avoid questions that presupposed know\ledge about dependant's Medical Center in no way indicates improper bias; rather, it was a reasonable means of maintaining a level playing field amount the applicants. Any anomaly shown by plaintiff in the interview process was not probative of discrimination.

plaintiff to be promoted to NUC by default. The decision to re-advertise, in which McCarthy participated and concurred, was based on several considerations. First, Tillman desired to have more than one qualified applicant in the selection pool.

Second, Tillman and McCarthy considered plaintiff's prior performance in the interview process to be less impressive than they would like to see in a candidate for the position. For example, in Tillman's view, plaintiff had shown a lack of sensitivity to the importance of process in communication and had failed to propose ways of encouraging staff involvement.

Third, Tillman gave Rome consideration to plaintiff's performance as Acting NUC for 5-South, which he had a reasonable opportunity to observe by January 1987. Although not ruling out plaintiff as a viable candidate, Tillman did have some concerns based on her performance, including her communication style, which he

thought tended to cut off discussion and the exchange of ideas.

The decision to re-advertise the position of NUC for 5-South was not racially motivated.

The position was re-advertised in the Washington Post in early 1987. In response to the advertisement, Ann Cooley (subsequently Ann Cooley Pierpont), a white female and outside applicant, submitted an application.

Cooley was interviewed for the 5-South NUC position on March 13, 1987. Her interviews included a lunchtime interview with personnel in NUC positions of other units.

Cooley was recommended by all of the interviewers with the exception of Gina Brooks, who recommended against offering the position to Cooley. Tillman and McCarthy considered Cooley's performance in the interview process to be substantially superior to that of plaintiff.

At the time of her interviews, Cooley already had received an M.S.N. degree in nursing administration. Plaintiff had not been admitted

into an M.S.N. program and had completed only a single course in personnel management. Cooley also had a medical-surgical certification that plaintiff did not have. Thus, Cooley's educational qualifications were substantially superior to those of plaintiff.[7]

Both plaintiff and Cooley had several years of ANC experience at defendant's Medical Center, as well as experience as Acting NUC with the Medical Center. In addition, however, Cooley had held the NUC-equivalent position of Head Nurse at National Rehabilitation Hospital for the past two years. In that role, Cooley had started up a new unit at the Hospital, experience that Tillman and McCarthy considered particularly important for the management of the large and challenging 5-South unit. Tillman and McCarthy reasonably deemed Cooley's work experience superior to that of plaintiff.

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[7]See supra note 4.

In addition to education, experience and interview performance, Tillman considered plaintiff's performance as Acting NUC, which, by March 1987, he had observed for four months. In his view, plaintiff's performance was less than fully satisfactory. Tillman noted plaintiff's inability to understand concepts discussed during staff meetings, her lack of leadership ability in handling staff concerns about providing nursing care for a critical care patient in a general unit, her style of keeping her office door closed and her continued tendency to cut off discussions rather than encourage open-ended communication.[8]

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[8] The only competent and reliable evidence offered by plaintiff that arguably traverses these specific concerns regarding plaintiff's performance was the testimony of Gina Brooks. However, Brooks' testimony did not Specifically contradict several of the concerns expressed by Tillman. Moreover, to the extent that Brooks expressed a different view regarding plaintiff's performance -- in her statement that plaintiff had strong leadership abilities -- her testimony is not inconsistent with Tillman's reasonable belief to the contrary, particularly given that Tillman was charged with supervising and evaluating plaintiff. Even as to the one

In April 1987, Cooley was offered the position of NUC for 5-South. The decision to offer the position to Cooley was based on the candidates' education, experience and interview performance and plaintiff's performance as Acting NUC; it was not based on race.

In mid-April 1987, plaintiff filed a charge of discrimination with the EEOC, claiming that the denial of the NUC position was racially discriminatory. She notified Tillman of the filing of the discrimination charge.

Seemingly "objective" point on which there is direct disagreement -- whether plaintiff frequently kept her office door closed -- the dispute may be largely a matter of perception.

In any event, plaintiff has not Shown that these concerns about plaintiff's performance were not sincerely believed by defendant's decisionmakers. Further, the testimony of Tillman and McCarthy is more reliable than that of Brooks, for it is more specific, it is supported by the documentary evidence, and Tillman and McCarthy were in a superior position to review plaintiff's work.

Finally, even without the concerns regarding plaintiff's performance as Acting NUC, Cooley's superior qualifications in the three areas of education, experience and interview performance were sufficient to justify the selection of Cooley instead of plaintiff.

On May 19, 1987, Cooley began her employment with defendant's Medical Center.

By letter dated May 25, 1987, plaintiff complained to McCarthy about a lack of support from Tillman in the performance of her duties as Acting NUC for 5-South. In her letter, plaintiff stated that Tillman had not permitted her to attend meetings on May 21 and May 22, 1987. The letter did not mention any refusal to allow plaintiff to attend earlier meetings, or her assertion that the lack of support was due to retaliatory animus on Tillman's part.

McCarthy met with plaintiff after receiving the letter. During that meeting, plaintiff did not mention any retaliatory or discriminatory motive, and McCarthy told plaintiff to attempt to resolve her difficulties directly with Tillman.

On June 14, 1987, plaintiff was officially returned to her previous position as ANC.

On June 26, 1987, Tillman asked plaintiff to reconsider the performance appraisals of the

other ANC; that she had prepared while Acting NUC. Tillman expressed concern that all of the ANCs had been rated as "exceeds requirements" in all categories, and that no areas of improvement had been identified for any of the ANCs. Such ratings appeared particularly inappropriate, in Tillman's view, because of a series of narcotics violations on 5-South reflecting the ANCs' failure to supervise properly the handling of narcotics by lower-level employees.[9]

Plaintiff's own performance evaluation for 1986-87, which was prepared by Tillman, reflected an overall rating of "exceeds requirements. In each specific category plaintiff was rated either "meets requirements" or "exceeds requirements."

Tillman submitted a copy of plaintiff's 1986-87 evaluation to the Payroll office before

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[9]Tillman's explanation of his directive to reconsider the evaluations was uncontradicted. Tillman issued the directive for the reasons stated and not in retaliation for plaintiff's filing of a discrimination charge.

showing it to plaintiff in order to ensure that her pay raise would be processed promptly.[10] Tillman had left the "position title" and other sections of the first page of the evaluation form blank when he showed it to plaintiff on July 14, 1987. Upon being provided with oral comments by plaintiff, Tillman completed the first page of the evaluation and submitted the original to Personnel. Plaintiff refused to sign the evaluation and told Tillman that she would provide written comments.

There is no reliable evidence that Tillman treated plaintiff differently or took any adverse action because of plaintiff's filing of a discrimination charge with the EEOC.[11]

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[10]Plaintiff has failed to introduce any support for her repeated suggestion that Tillman diverged from common practice in the manner in which he forwarded a copy of plaintiff's 1986-87 evaluation to Payroll to ensure timely receipt of her pay raise.

[11]Plaintiff alleged a lack of support from Tillman both before and after the filing of her discrimination charge, negating the inference of a causal connection between the filing and the alleged lack of support. The meetings from which

Plaintiff testified to some difficulties she experienced with Cooley, the new NUC for 5-South, involving plaintiff's work schedule and the placement of some negative information in plaintiff's file. Plaintiff initially testified that these incidents reflected retaliatory motivation on Cooley's part. Upon further examination, however, plaintiff effectively retracted her earlier statement and admitted that the problems were simply due to Cooley's lack of familiarity with defendant'; personnel procedures.

In any event, there is no evidence of a causal connection between Any adverse action of Cooley and plaintiff's filing of the discrimination charge.

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plaintiff allegedly was excluded took place after Cooley's arrival, and there is no indication that plaintiff should have been present in addition to Cooley. Similarly, there is no reliable evidence that any of the other actions put forward by plaintiff had anything to do with the filing of plaintiff's EEOC charge.

On November 24, 1987, plaintiff tendered her resignation, effective December 8, 1987. Plaintiff resigned voluntarily. There is no evidence that plaintiff faced circumstances in her employment under which a reasonable employee would have felt forced to resign.

Plaintiff presented statistical evidence reflecting the racial composition of the Medical Center's workforce between January 1981 and August 1989. For example, of the 532 individuals in nursing management positions during this period, 84.9 percent were white, while 10.8 percent were black. Of the Medical Center'; 60 NUCs (within the nursing management category), 86.7 percent were white and 8.3 percent were black. In the combined total of nursing management and professional positions requiring an R.N. license, 82.7 percent of the 3,085 individuals were white, while 10.6 percent were black.

Of the 2,967 individuals in nonmanagement, non-R.N.-required positions (including patient

escort, secretarial and clerical positions), 69 percent were black and 19 percent were white.

There is no reliable evidence that the MedicAl Center's workforce was intentionally segregated on the basis of race. The evidence reveals that defendant administered Equal Employment Opportunity and Affirmative Action policies in employment decisions for its Medical Center before, during and after the events directly at issue in this case. Defendant engaged in efforts to recruit black nurses for the Medical Center's professional and management positions.[12]

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[12]Plaintiff repeatedly refers to a statement of an unnamed doctor in ^ January 1987 report that the Medical Center has "an understructure of Black underpaid workers who have a camaraderie among themselves, but who do not give a damn about the hospital institution as a whole" and that "[racial Separation on the basis of race is extremely strong." Plaintiff's use of these statements is inadmissible hearsay, and the document in question was expressly admitted not for the truth of the matter asserted, but to show McCarthy's knowledge of the document. McCarthy testified not only that defendant engaged in efforts to recruit blacks prior to issuance of the 1987 report, but that defendant intensified its recruitment efforts after

The ultimate facts are that both Michaels and Cooley were better qualified to be NUC for 5-South than was plaintiff, defendant had nondiscriminatory reasons to re-advertise the position when Michaels proved not to be available, and defendant ultimately selected Cooley instead of plaintiff for the position for nondiscriminatory reasons.

II. CONCLUSIONS OF LAW

A.

Plaintiff has attempted to meet the burden of proof on her discrimination claim in three ways. First, she offered statistical evidence purporting to establish disparate treatment of plaintiff and other black employees. Second, she attempted to show patterns and practices of discrimination through the use of comparative charts. Finally, she attempted to prove individual disparate treatment using the indirect method of proof established by

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issuance of the report.

McDonnell Douglas Coast. v. Green, 411 U.S. 792 (1973).

As explained more fully below, because plaintiff has failed to carry her burden of proving discrimination against her, and because of the order in which The presented her case, it is ultimately unnecessary to decide whether she has established a prima facie case; in any event, plaintiff has offered insufficient evidence -in the form of either direct evidence or circumstantial evidence that defendant's offered reasons were pretextual -- that defendant's action in not selecting plaintiff for the 5-South NUC position was based on race.

Reliable and probative statistical evidence may be used to establish a prima facie case of disparate treatment under Title VII. See Davis v. Califano, 613 F.2d 957, 962 (D.C. Cir. 1979).

On April 19, 20 and 21, 1993, plaintiff presented testimony from and a variety of charts prepared by Dr. Jonathan W. Work, who was educated and has worked for several years on

issues of discrimination in the workplace and in the field of econometrics. Work was conditionally qualified to testify as an expert on the racial composition of defendant's workplace and how that composition came about.

Initially, Dr. Work presented his findings regarding the employment of blacks at defendant's Medical Center. Dr. Work's analysis purported to show that they were s bstantially underutilized in management and professional positions with the Medical Center.

It soon became apparent, however, that Dr. Work's analysis was seriously flawed and therefore unreliable and of limited probative value. It is settled that such employment statistics must be considered in the context of the relevant labor market. See Wards Cove Packina Co. v. Atonio, 490 U.S. 642, 650-51 (1989); Davis v. Califano, 613 F.2d at 963 (statistics must compare "the relevant work force and the qualified population in the relevant labor market"). Dr. Work attempted to

perform an analysis based on the 1980 Bureau of the Census Characteristics of the Population, Detailed Population Characteristics for the District of Columbia.

A fair reading of that report makes clear that the labor market data used in Dr. Work's analysis were limited to the geographical confines of the District of Columbia, rather than the Washington metropolitan area or the area including the District, Virginia and Maryland.[13] Because the Medical Center's nurses do not come exclusively from the District of Columbia, Dr. Work's utilization analysis was premised on an incorrect labor market. See Hammon v. Barry, 826 F.2d 73, 77 (D.C. Cir. 1987) (relevant labor market is Washington metropolitan area, not confines of D.C.).

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[13]See 1980 Census of Population, U.S. Department of Commerce, Bureau of the Census, Appendix B at B-12. This document was used by defendant during the voir dire of Dr. Work as Defendant's Exhibit 96. Further, as an official government publication, it may by judicially noticed by the Court.

In any event, when the labor market problem with Dr. Work's analysis came to light during presentation of plaintiff's case, plaintiff withdrew it.

The other statistical evidence offered through Dr. Work consisted of internal Medical Center data intended to demonstrate a racial imbalance in the workforce. Although these exhibits and testimony were admitted for what they are worth, they probably do not constitute reliable evidence sufficient to establish a prima facie case of discrimination.

First, Dr. Work merged data for the period 1981 through 1989, rather than focusing on the specific period in question, December 1986 through March 1987. While such an approximation does not render the data completely irrelevant, it does diminish their probative value.

Second, individuals were counted multiple times if they held different positions during the surveyed period, further tending to skew the results.

Third, and most important, Dr. Work's comparative analysis failed to account for the specific qualifications for the different positions. Thus, the comparison of lower-level positions such as LPN, patient escort and clerical jobs -- which have no R.N. licensure requirement -- with positions that do require an R.N. license is not a relevant comparison. The case law indicates that only individuals with the relevant qualifications may provide the basis for a comparison that is probative of discrimination. See Wards Cove, 490 U.S. at 651-52; Hammon, 813 F.2d at 427 n.31. Plaintiff failed to show that employees at higher and lower levels in the employment hierarchy possessed qualifications and experience sufficiently similar to the NUC position to justify comparison.

In the final analysis, Dr. Work's statistical evidence showed merely that there were greater numbers of whites in certain positions than there were blacks. From this

fact, coupled with his determination that the disparity was not attributable to chance, Dr. Work concluded that intentional discrimination by the defendant was the explanation. That ultimate conclusion, however, was not bared on reasonably reliable scientific analysis; it failed to consider alternative determinants (such as socio-economic factors, licensing requirements and educational qualifications), as well As the lack of any reliable comparison to the relevant labor market and the other problems identified above.

The Supreme Court has recently addressed the trial court' 6 role in deciding whether to admit "expert" scientific evidence in a federal trial. In Daubert v. Merrell Dow Pharmaceuticals, Inc., 61 U.S.L.W. 480S, 1993 U.S. LEXIS 4408, *8 (June 28, 1993), the Court made clear that "under the Rules [of Evidence] the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." In particular, the

Court instructed that the "helpfulness" standard of Federal Rule of Evidence 702[14] "requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility." Id. at *10. From these teachings it follows that Dr. Work's ultimate opinion that the workforce data evidence intentional discrimination by defendant is not derived from a reliable scientific analysis. Accordingly, if this issue were dispositive, that opinion would be inadmissible under Rules 702 and 403 as explicated by Daubert, and it would be disregarded.

The workforce data themselves, which reflect the racial breakdown of various categories of positions within the Medical

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[14]Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, *training*, or education, may testify thereto in the form of an opinion or otherwise.

The Court held in Daubert that the "general acceptance" test of Frye v. United States, 293 F. 1013 (1923), was superseded by the adoption of the Federal Rules of Evidence.

Center between 1981 and 1989, are admissible. However, for the reasons stated previously, they have very limited probative value and, if the issue were dispositive, would be insufficient to establish a prima facie case of discrimination.

Even if the Statistical evidence offered by plaintiff were sufficient to establish a prima facie case of disparate treatment, plaintiff has failed to present sufficient evidence to survive defendants Rule 52(c) motion. In order to have standing to challenge the disputed conduct, plaintiff must make a showing that she was injured by that conduct. See generally Allen v. Wright, 468 U.S. 737, 751 (1984). See also East Texas Motor Freight SYS. Anc. v. Rodriquez, 431 U.S. 395, 403-05 (1977) (unqualified applicants lacked standing to represent class in Title VII action). Even if some employees suffered from impermissible discrimination, there is no credible evidence, or in any event, insufficient evidence, that plaintiff's nonselection for the

position of NUC for 5-South was racially motivated.

Nor can plaintiff's attempts to show individual disparate treatment through the indirect method of proof prevail. As demonstrated hereafter, she has failed to carry her burden of establishing that defendant's reasons for nonselection were pretextual (and discriminatory). Rather, plaintiff has adduced evidence from the direct and cross-examination of witnesses whom she called that supports defendant's position that the reasons were not pretextual, but were legitimate and nondiscriminatory.

In support of her claim that defendant engaged in a "pattern or practice" of discrimination, plaintiff's principal evidence consisted of a series of "comparative charts" purporting to show that whites were promoted to NUC positions more often than blacks. Again, however, serious deficiencies in plaintiff's evidence preclude the establishment of a prima

facie case, or the carrying of her burden of proof on the merits.

First, the comparative charts conspicuously omit any experience gained from employment other than with defendant. While all of plaintiff's professional experience (including pre-R.N. experience) was at defendant's Medical Center, it is clear that many of the other nurses have experience prior to their employment with defendant that is not reflected in the charts.

Second, the charts lack information on the educational credentials of several of the nurses, and thus are incomplete in this important aspect as well.

Third, the charts include information about a number of nurses who were not within the Department of Nursing of the Medical Center. Because the employment of these nurses was not under the control of the decisionmakers involved in this case, Tillman and McCarthy, this information is irrelevant.

Because of these defects, plaintiff's comparative charts are neither reliable nor probative. Further, plaintiff's evidence fails to show, through an analysis of the qualifications of the applicants for any particular NUC position or through analysis of personnel files, that whites were promoted routinely when they were not the best qualified applicants for the positions involved. The information contained in plaintiff's comparative charts aside from being incomplete) is essentially anecdotal in nature.

In contradiction to plaintiff's assertion of a pattern of discrimination in the selection of NUCs, McCarthy testified that she had hired several black employees for the position of NUC, from both inside and outside the Medical Center, and that the black applicants had white competitors. McCarthy also testified that the NUC positions were advertised outside the Medical Center, and that in each instance the most qualified applicant was selected,

irrespective of race. Plaintiff has provided insufficient probative evidence to refute McCarthy's testimony.

Even if the comparative charts were adequate to make out a prima facie case of a pattern or practice of discrimination by the defendant, plaintiff has nevertheless failed to carry her burden of showing redressable discrimination. As noted above, plaintiff, to have standing, must show that she was denied the position of NUC because of discrimination. However, plaintiff has not shown that she was better qualified for the 5-South NUC position than her competitors, nor has she shown that defendants reasons for not selecting her were pretextual or ultimately discriminatory. Rather, her own evidence sustains defendant's portion that the reasons were legitimate and nondiscriminatory.

In order to establish a prima facie case of individual race discrimination, a plaintiff must show: (1) that she belongs to a racial minority;

(2) that she applied and was qualified for a vacant position; (3) that she was rejected for the position; and (4) that a white applicant with equivalent credentials was offered the position, or alternatively, that the position remained open and the employer continued to seek applicants with the plaintiff's qualifications. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

Once these facts are established, the employer must then produce evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). When the employer's nondiscriminatory reason has been presented, the presumption of discrimination "drops from the case." St. Mary's Honor Center v. Hicks, 61 U.S.L.W. 4782, 1993 U.S. LEXIS 4401, *11 (June 25, 1993) (quoting Burdine, 450 U.S. at 255) (emphasis added).

The plaintiff then has the opportunity to demonstrate that the employer's proffered reason was not the true reason for the decision. A demonstration that the employer's proffered reason was pretextual permits the trier of fact to infer the ultimate fact of intentional discrimination; however, as the Supreme Court held last month in St. Mary's Honor Center, a showing of pretext does not compel either a finding of discrimination or a judgment for the plaintiff. Id. at *16. The plaintiff at all times retains the ultimate burden of persuading the trier of fact that she was the victim of intentional discrimination. Ids at *11; Burdine, 450 U.S. at 253, 256.

At the point when the employer has offered its nondiscriminatory reason for the employment decision, the trier of fact is in a position "to decide the ultimate question: whether plaintiff has proven that the defendant intentionally discriminated against [him]' because of his

race." St. Mary's Honor Center, 1993 U.S. LEXIS 4401, at *15 (quoting Burdine, 450 U.S. at 253).

In this case, defendant has conceded the first three elements of a prima facie case: that plaintiff (1) belongs to a racial minority, (2) applied and was qualified for the NUC position, and (3) was rejected for the position. Defendant also concedes that the candidates offered the position, Michaels and Cooley, were white; defendant does not concede, however, that those candidates were only as qualified for the position as plaintiff. As set forth in the Findings of Fact, supra, defendant's decisionmakers reasonably determined that plaintiff was not as qualified for the NUC position as either Michaela or Cooley. It appears, therefore, that plaintiff has not established a prima facie case of individual disparate treatment based on race.

At the same time, it must be recognized that many cases treat the plaintiff's prima facie case under McDonnell Douglas as relatively

easy to establish, and it may be that plaintiff's minimal qualification for the NUC position is sufficient to satisfy the fourth prong of the prima facie case. Accordingly, defendant's Rule 52(c) motion is considered on the hypothesis that plaintiff has established a prima facie case.

Ordinarily under such circumstances, it would be difficult for a defendant to prevail on a Rule 52(c) motion. Following the presentation of plaintiff's prima facie case, defendant would be obliged to come forward in its case with proof of nondiscriminatory reasons for the decision in question, and the plaintiff, in rebuttal, would present her evidence of pretext.

This case, however, is different. Plaintiff chose to proceed by calling the decisionmakers in her case-in-chief And eliciting from them the reasons for the disputed decisions. Thus, the employer's legitimate, nondiscriminatory reasons for the decisions were presented during plaintiff's case. Plaintiff then attempted, in

her case, to show that those reasons were pretextual. As plaintiff stated, she "offered her evidence of pretext during her case in chief."[15]

Because, at the close of plaintiff's case, defendant's nondiscriminatory reasons have been presented, the presumption of discrimination "drops from the case" under St. Mary's Honor Center and Burdine. This leaves for resolution the ultimate issue of intentional discrimination

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[15] Plaintiff's Proposed Findings of Fact and Conclusions of Law, at 39. The strategy adopted by plaintiff's counsel appeared to be the risky one of putting defendant's decisionmakers on the stand and examining them at length in an attempt to extract a confession or catch them in a contradiction. The risks of such a strategy became clear at the trial: the witnesses did not confess to discrimination on the basis of race, nor did they make any material contradictions; they did, however, explain their nondiscriminatory reasons for not selecting plaintiff for the NUC position. Plaintiff chose to proceed in this manner despite strong urging by the Court during two pretrial conferences that the trial should proceed in the order established by McDonnell Douglas's indirect method of proof.

vel non.[16]

As explained below, plaintiff has presented insufficient probative evidence to carry her burden of showing that defendant's offered reasons for the decisions in question were pretextual or that plaintiff's nonselection was the result of discrimination based on race: rather, plaintiff's proof establishes that defendant employed a person better qualified for the position.[17]

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[16]As the Court explained in St. Mary's Honor Center: "If . . . the defendant has succeeded in carrying its burden of production, the McDonnell Douglas framework -- with its presumptions and burdens -- is no longer relevant." 1993 U.S. LEXIS 4401, at *15.

[17]The one reason that a court might hesitate to grant a defendant's Rule 52(c) motion even after the plaintiff has offered her evidence of pretext in her case-in-chief is the following: theoretically, a defendant might offer in its case a previously undisclosed nondiscriminatory reason for the disputed decision, and a plaintiff might benefit from the opportunity in rebuttal to demonstrate that new reason is pretextual. This possibility, while perhaps significant in other cases, is not of concern here for several reasons.

First, this case has seen 12 days of trial, as well as extensive discovery and numerous substantive motions over the course of four

The testimony of Tillman and McCarthy clearly established that they reasonably considered plaintiff to be less qualified for the 5-South NUC position than Michaels and Cooley. The latter two applicants exceeded plaintiff in each of-the three areas to be considered: experience, education and interview performance. In addition, with respect to the decision to re-advertise the position (after

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years. There is no secret or genuine dispute about which nondiscriminatory reasons were going to be offered by the defendant; it is simply implausible that previously undisclosed nondiscriminatory reasons would be put forward in defendant's case. It is noteworthy in this regard that "[t]he McDonnell Douglas methodology was never intended to be rigid, mechanized, or ritualistic." St. Mary's Honor Center, 1993 U.S. LEXIS 4401, at *31-32 (citation and internal quotations omitted).

Second, as St. Mary's Honor Center makes clear, a finding of pretext does not necessitate a finding of discrimination. Even if an additional nondiscriminatory reason offered by defendant were shown to be pretextual, intentional discrimination would not be found in this Base. Rather, the finding would still be that plaintiff's nonselection was because she was less qualified than the other applicants, not because of her race.

Finally, plaintiff has not argued this point in its filings or oral argument on defendant's motion.

Michaels had declined it) and the decision to offer the position to Cooley, the decisionmakers took into consideration genuine concerns they had about plaintiff's performance as Acting NUC for 5-South. These reasons for defendant's decision not to select plaintiff for the NUC position are plainly legitimate, nondiscriminatory reasons, and they are supported by documentary evidence as well as the consistent testimony of Tillman And McCarthy.

Plaintiff attempted to establish that the M.S.N. degree was not a valid educational requirement for the NUC position by proffering further testimony of Dr. Work and two exhibits prepared by him. Dr. Work utilized one fact (overall performance) derived from multi-page annual performance evaluations of 42 incumbent NUCs, and compared it to the educational level of each of the NUCs. He concluded that there was no statistically significant difference in the average overall performance ratings of NUCs associated with educational attainment. As with

Dr. Work's other evidence, his analysis of the M.S.N. degree qualification is fatally flawed.

First, Dr. Work utilized different years and different numbers of years for each surveyed NUC. Thus, the analysis is not based on a uniform pool of data and therefore is unreliable.

Second, he did not control for the different supervisory personnel who prepared the evaluations of each individual.

Third, Dr. Work utilized a mingle educational level for each NUC, even though some of them changed educational levels while in the NUC position.

Fourth, the analysis did not consider partial advancement toward the next educational level.

Fifth, the sample size used in Dr. Work's analysis is too small to yield scientifically

reliable conclusions for the type of analysis performed.[18]

Finally, Dr. Work's analysis fails to control for the work experience of the incumbent NUCs, either in the NUC role or prior to that role. Prior experience obviously would be expected to have a major impact upon performance.

Taken together, these deficiencies in Dr. Work's analysis render it inaccurate and without genuine probative value. Moreover, McCarthy testified persuasively and without contradiction that the M.S.N. degree is given great weight in the professional nursing community for nursing management positions. She had overseen the establishment of an M.S.N. program for defendant's nurses in conjunction with Marymount

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[18]See Schmidt & Hunter, The Future of Criterion-Related Validity, Personnel Psychology 33 (1980); Schmidt, Hunter & Urry, Statistical Power in Criterion-Related Validation Studies, J. Applied Psych., Vol. 61, No. 4, at 473-85 (1976). The Court takes judicial notice of these scholarly publications.

University. McCarthy also indicated that it was important to encourage attainment of that educational degree in order to maintain the skills level required for continued competitiveness, and she cited support for the validity of the M.S.N. qualification in the professional literature. In any event, the evidence in persuasive that defendant applied the M.S.N. qualification in good faith as a valid criterion, and there is no competent evidence showing that it was applied as a pretext for discrimination.[19]

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[19]Plaintiff contends that the M.S.N. requirement was manipulated by the defendant and points out that the degree was variously "required" and "preferred" for NUC positions at different times. As explained by the uncontradicted testimony of McCarthy, however, the M.S.N. qualification changed only in response to the needs of the Medical Center and the limitations of the labor market. At all times, McCarthy desired to have an M.S.N. requirement for NUC positions, but such a requirement was not feasible during shortages of nursing personnel.

Plaintiff also Argues that she met the educational qualification because she had experience that was equivalent to an M.S.N. Plaintiff confuses the entry-level qualification -- "A Master's degree in Nursing or the

Plaintiff suggests that Michaels was preselected for the 5-South NUC position. She relies on a selection document bearing the date of September 19, 1986. It is clear from the document itself, however (as well as the uncontested testimony of Tillman), that the same document was used for the earlier denial of Michaels' application for NUC of 2-East and for offering her the 5-South position.[20] There is no competent evidence supporting plaintiff's suggestion of Michaels' preselection.

Plaintiff asserts that defendant violated its own policies by failing to promote plaintiff before considering outside applicants. The relevant provision of defendant's Manual of Employment Directives states: "Before outside

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equivalent combination of education and experience" -- with being the best qualified for the position. Other things being equal, it is permissible for an employer to consider greater educational attainment a positive factor in an employment decision.

[20]Gina Brook's statement regarding Michael's alleged preselection is inadmissible hearsey. See supra note 5.

recruitment sources are explored, Personnel Services will review its applicant files, including those previously screened for University employment. This directive simply ensures that Personnel identifies existing sources of applicants (including prior outside candidates for other positions, such as Michaels). It does not preclude the consideration of outside applicants or the hiring of better qualified outside applicants. Moreover, the policy is imposed on Personnel Services, not the decisionmakers involved here, and no evidence has been offered that Personnel Services violated the policy.

Plaintiff also points to differences in the interview process as proving discriminatory animus. However, anomalies in personnel procedures do not necessarily show unlawful discrimination. See Oates v. District of Columbia, 824 F.2d 87, 93 (D.C. Cir. 1987): Ledoux v. District of Columbia, 820 F.2d 1293, 1306-07 n.22 (D.C. Cir. 1987). As set forth in

the Findings of Fact, the differences were credibly explained and suggest no improper motivation. All supra note 6.

Plaintiff has failed to offer evidence sufficient to show that defendant's nondiscriminatory reasons for its employment decisions are unworthy of credence, or that those decisions were racially motivated. Rather, she adduced evidence supporting defendant's position that its reasons were legitimate and nondiscriminatory. Accordingly, she has failed to carry her burden under Rule 52(c).

There remains for consideration plaintiff's retaliation claim. To establish a prima facie case of retaliation, a plaintiff must show: (1) that she engaged in protected activity; (2) that the defendant took an adverse personnel action against the plaintiff; and (3) that the adverse personnel action was causally related to the plaintiff's exercise of protected rights. Berger v. Iron Workers Reinforced Rodmen Local 201, 843 F.2d 1395, 1423 (D.C. Cir. 1988).

Following plaintiff's filing of an EEOC charge in April 1987, she received a favorable evaluation (an overall "exceeds requirements") as well as a pay raise. Such an evaluation and pay increase cannot possibly be construed as an adverse personnel action. Nor did Tillman's directive to plaintiff to reconsider her evaluations of other ANCs, or his temporary failure to complete the front page of an evaluation form, constitute an adverse employment action.

Plaintiff's principal assertion with respect to Tillman appears to be that he prevented her from attending certain meetings in April or May of 1987.[21] However, such minor

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[21]As set forth in the Findings of Fact, supra, plaintiff initially suggested that some problems she experienced with Cooley were also in retaliation for her filing of an EEOC charge. Plaintiff conceded on the stand, however, that the problems were merely the result of Cooley's lack of familiarity with defendant's personnel procedures. In any event, these alleged actions on Cooley's part do not constitute adverse personnel actions, and there is no evidence that they were causally related to plaintiff's protected activities (or even that Cooley was

events with little or no concrete impact on plaintiff's employment situation do not rise to the level of adverse personnel actions. See, e.g., Pinar v. Dole, 747 F.2d 899, 912 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985): Gold v. Gallaudet College, 630 F. Supp. 1176, 1189 (D.D.C. 1986); Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1360 (W.D. Pa. 1977).

Plaintiff presented no reliable evidence that the defendant "deliberately made . . . working conditions intolerable and drove [her] into an involuntary quit." Retail Store Employees Union Local 880 v. NLRB, 419 F.2d 329, 332 (D.C. Cir. 1969). Thus, there is no basis for a conclusion that plaintiff's decision to resign involved a "constructive discharge." See also Yates v. Avco Corp., 819 F.2d 630, 636-37 (6th Cir. 1987).

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aware of such activities).

In addition, there is insufficient evidence of a causal connection between any of the alleged adverse actions and plaintiff's filing of her discrimination charge. Indeed, the evidence presented in plaintiff's case negated an inference of causation, for plaintiff complained of a lack of support from Tillman before as well as after the filing of the charge.

Because plaintiff has failed to establish a prima facie case of retaliation for her protected activity, or to carry her burden of proof on the merits, her retaliation claim fails under Rule 52(c).

* * * *

For the foregoing reasons, an accompanying Order enters judgment for defendant pursuant to Federal Rule of Civil Procedure 52(c).

Dated: July 27, 1993

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED FEBRUARY 9, 1993
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

DEBORAH QUICK SCALES
Plaintiff

v.

THE GEORGE WASHINGTON UNIVERSITY
Defendant

Civil Action No. 89-0796-LFO

ORDER

For the reasons stated in the accompanying Memorandum, it is this 27th day of July, 1993, hereby

ORDERED: that defendant's motion for judgment as a matter of law under Fed. R. Civ. P. 52(c) should be, and is hereby, GRANTED; and it is further

ORDERED: that judgment is hereby entered in favor of defendant on all remaining counts.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

DEBORAH QUICK SCALES,

PLAINTIFF,

-VERSUS- DOCKET NO. CA 89-796

GEORGE WASHINGTON UNIVERSITY,

DEFENDANT

.....

WASHINGTON, D.C.
APRIL 19, 1993
9:30 A. M.

TRANSCRIPT OF TRIAL BEFORE
THE HONORABLE LOUIS F. OBERDORFER,
UNITED STATES DISTRICT JUDGE,
AND A JURY.

APPEARANCES:

FOR THE PLAINTIFF: WENDU MEKBIB, ESQ.

FOR THE DEFENDANT: JACK M.H. FRAZIER, ESQ.
THOMAS D. QUINN, ESQ.

COURT REPORTER: SANTA THERESA ZIZZO,
U. S. DISTRICT COURT,
ROOM 4800 C
3RD & CONSTITUTION AVE.
N.W.

(COMPUTER-AIDED TRANSCRIPTION OF STENOTYPE NOTES)

(FROM ORIGINAL PAGE 6)

THE COURT: I DON'T SEEM TO HAVE IT, DO YOU HAVE ANOTHER SET OF IT?

MR. MEKBIB: YES, I COULD PROBABLY FIND IT, YES.

THE COURT: THANK YOU. THAT'S ALL.

(BENCH CONFERENCE CONCLUDED)

(PROSPECTIVE JURY PANEL PRESENT).

THE DEPUTY CLERK: THIS IS THE MATTER OF DEBORAH SCALES VERSUS GEORGE WASHINGTON UNIVERSITY. CIVIL ACTION 89-796. MR. MEKBIB FOR THE PLAINTIFF. MR. FRAZIER AND MR. QUINN FOR THE DEFENDANTS.

WOULD THE MEMBERS OF THE JURY PANEL PLEASE STAND AND RAISE YOUR RIGHT HANDS?

(PROSPECTIVE JURY PANEL SWORN).

THE DEPUTY CLERK: LADIES AND GENTLEMEN, AS I CALL YOUR JUROR NUMBER PLEASE STAND, ANSWER PRESENT, AND THEN BE SEATED. JUROR NUMBER 3275. 3147. 4142. 3878. 4049. 3106. 2846. 2823. 3419. 2808. 3183. 4045. 4162. 4168. 3253. 2737. 4010. 4098. 3960. 2812. 3771. 3630. 4057.

(ALL PROSPECTIVE JURORS ANSWERED PRESENT).

THE DEPUTY CLERK: IS THERE ANY MEMBER OF THE JURY PANEL WHOSE NUMBER WAS NOT CALLED? THANK YOU.

THE COURT: GOOD MORNING, LADIES AND GENTLEMEN.

(FROM ORIGINAL PAGE 13)

IS NURSING UNIT COORDINATOR AT THE GEORGE WASHINGTON UNIVERSITY, ARTHUR WILSON, WHO IS AN INVESTIGATOR FOR THE HOSPITAL AND FROM THERESA EVERHART-MC GOWAN WHO WAS A NURSE RECRUITER FOR THE GEORGE WASHINGTON UNIVERSITY.

THE COURT: DOES ANYONE RECOGNIZE ANY OF THOSE POTENTIAL WITNESSES BY NAME? I GATHER NONE DOES.

NOW, LADIES AND GENTLEMEN, WE NEED TO KNOW WHETHER ANY OF YOU HERE OR YOUR IMMEDIATE FAMILY MEMBERS ARE NOW OR HAVE IN THE PAST BEEN ASSOCIATED WITH GEORGE WASHINGTON UNIVERSITY, AND PARTICULARLY THE HOSPITAL AS AN EMPLOYEE, STUDENT, ALUMNUS, ALUMNA, ANY OTHER CONNECTION.

WOULD THOSE WHO HAVE THOSE CONNECTIONS PLEASE

STEP

OUT IN THE AISLE AND THE CLERK WILL FURNISH YOU WITH A MIKE.

IF YOU CAN STATE YOUR JUROR NUMBER AND THEN ANSWER MY QUESTION.

A PROSPECTIVE JUROR: 2323.

THE COURT: 2323.

THE DEPUTY CLERK: NUMBER EIGHT ON PAGE ONE.

THE COURT: ALL RIGHT. WHAT IS YOUR ANSWER TO MY QUESTION?

A PROSPECTIVE JUROR: MY WIFE FORMERLY WORKED

(FROM ORIGINAL PAGE 14)

FOR GW HOSPITAL.

THE COURT: IN WHAT CAPACITY?

A PROSPECTIVE JUROR: SHE STARTED AS HOUSEKEEPING AND I THINK SHE ENDED UP AS A CLERK, FILE CLERK.

THE COURT: ALL RIGHT. I THINK I'LL ASK YOU TO COME IN AND SIT DOWN AND WE'LL TALK TO YOU AT THE BENCH IN A MOMENT.

LET'S GET THE REST OF THEM. THE NEXT PERSON, YOUR NUMBER PLEASE, MA'AM.

A PROSPECTIVE JUROR: 2737.

THE COURT: YES, MA'AM, AND YOU'RE -- LET'S SEE.

A PROSPECTIVE JUROR: I DIDN'T HEAR YOU. I'M NOT SURE IF THIS IS APPLICABLE BUT I HAVE A HEALTH PLAN WITH GEORGE WASHINGTON UNIVERSITY AND ALSO I HAVE A COUSIN WHO WORKS THERE.

THE COURT: DOES THE HEALTH PLAN REQUIRE YOU TO USE THE SERVICES OF THE UNIVERSITY HOSPITAL?

A PROSPECTIVE JUROR: YES.

THE COURT: DO YOU GO THERE OFTEN?

A PROSPECTIVE JUROR: EXCUSE ME?

THE COURT: HAVE YOU HAD OCCASION TO GO THERE AND BE SEEN?

A PROSPECTIVE JUROR: FOR YEARLY CHECK-UPS.

(FROM ORIGINAL PAGE 15)

THE COURT: IS THERE ANYTHING ABOUT THOSE RELATIONSHIPS THAT WOULD MAKE IT DIFFICULT FOR YOU TO DECIDE THIS CASE ON THE FACTS AND THE LAW AS THEY DEVELOP?

A PROSPECTIVE JUROR; NO, YOUR HONOR.

THE COURT: DOES EITHER COUNSEL WISH TO INQUIRE OF THIS JUROR?

MR. MEKBIB: I'M INTERESTED IN FINDING OUT WHAT HER COUSIN ACTUALLY DOES AT GEORGE WASHINGTON UNIVERSITY.

THE COURT: WHAT WHO DOES?

MR. MEKBIB: COUSIN.

THE COURT: WHAT DOES YOUR COUSIN DO AT THE UNIVERSITY. A PROSPECTIVE JUROR: I'M NOT SURE WHAT CAPACITY SHE'S EMPLOYED. I KNOW SHE DOES CLERICAL WORK.

THE COURT: DO YOU TALK TO HER ABOUT HER WORK?

A PROSPECTIVE JUROR: NO, I DON'T.

THE COURT: ANYTHING THAT YOU KNOW ABOUT HER SITUATION THERE THAT COULD HAVE A BEARING ON THE QUESTION OF THE EMPLOYMENT PRACTICES IN THE HOSPITAL?

A PROSPECTIVE JUROR: NO, YOUR HONOR.

THE COURT: YOU MAY BE SEATED.

MR. MEKBIB: THANK YOU. I HAVE NO FURTHER QUESTIONS.

THE COURT: WHY DON'T YOU STAY THERE.

MR. MEKBIB: ALL RIGHT.

THE COURT: YOUR NUMBER PLEASE, MA'AM?

A PROSPECTIVE JUROR: 3253.

THE COURT: ALL RIGHT. YES, MA'AM.

A PROSPECTIVE JUROR: MY MOTHER WORKS THERE AT GILMAN'S LIBRARY AT GW.

THE COURT: SHE WORKS AT THE LIBRARY.

A PROSPECTIVE JUROR: YES.

THE COURT: DOES EITHER COUNSEL HAVE QUESTIONS?

MR. MEKBIB: HOW LONG HAS SHE WORKED THERE?

A PROSPECTIVE JUROR: SIX YEARS.

MR. MEKBIB: 16 YEARS.

A PROSPECTIVE JUROR: SIX.

MR. MEKBIB: WHAT IS HER POSITION?

A PROSPECTIVE JUROR: SHE WORKS IN HOUSEKEEPING.

MR. MEKBIB: NO MORE QUESTIONS.

THE COURT: DOES SHE TALK TO YOU ABOUT HER WORK?

A PROSPECTIVE JUROR: YES.

THE COURT: MAYBE YOU'D BETTER SIT DOWN THERE ON THE FRONT BENCH AND WE'LL TALE TO YOU PRIVATELY.

(FROM ORIGINAL PAGE 17)

YOUR NUMBER?

A PROSPECTIVE JUROR: 4098.

THE COURT: ALL RIGHT, SIR.

A PROSPECTIVE JUROR: I WORK FOR THE DEPARTMENT OF HEALTH CARE SCIENCES ON THE SECOND FLOOR IN THE ACC BUILDING.

THE COURT: DO YOU HAVE ANY EXPERIENCE WITH THE GEORGE WASHINGTON UNIVERSITY HOSPITAL?

A PROSPECTIVE JUROR: YES, I GO BACK AND FORTH.

THE COURT: WHAT IS YOUR RELATIONSHIP WITH THE HOSPITAL?

A PROSPECTIVE JUROR: I'M A MEDICAL SECRETARY FOR THE DEPARTMENT OF HEALTH CARE SCIENCES ON THE SECOND FLOOR.

THE COURT: PERHAPS YOU'D BEST SIT DOWN, IF YOU DON'T MIND, ON THE FRONT ROW THERE AND WE'LL

TALK TO YOU UP HERE.

YES, MA'AM, YOUR NUMBER.

A PROSPECTIVE JUROR: 4168.

THE COURT: YES, MA'AM.

A PROSPECTIVE JUROR: I WAS A STUDENT AT GEORGE WASHINGTON.

THE COURT: UNIVERSITY.

A PROSPECTIVE JUROR: YES.

(FROM ORIGINAL PAGE 18)

THE COURT: DID IT HAVE ANY CONNECTION WITH THE HOSPITAL?

A PROSPECTIVE JUROR: NO.

THE COURT: DOES EITHER COUNSEL WITH TO INQUIRE?

MR. MEKBIB: WHAT FIELD DID YOU STUDY IN?

A PROSPECTIVE JUROR: ANTHROPOLOGY.

MR. MEKBIB: ARE YOU AN ALUMNA OF THE UNIVERSITY?

A PROSPECTIVE JUROR: NO, I DIDN'T GET A DEGREE.

MR. MEKBIB: HOW LONG DID YOU STUDY THERE?

A PROSPECTIVE JUROR: A YEAR.

MR. MEKBIB: WHY DID YOU NOT FINISH YOUR STUDIES THERE?

A PROSPECTIVE JUROR: BECAUSE IT WASN'T A GRADUATE DEGREES PROGRAM. IT WAS ESPECIALLY FOR TEACHERS.

MR. MEKBIB: DID YOU FINISH THE PROGRAM YOU WERE IN?

A PROSPECTIVE JUROR: NO.

MR. MEKBIB: WERE YOU UNHAPPY WITH THE EDUCATION THAT YOU RECEIVED THERE?

A PROSPECTIVE JUROR: YES.

MR. MEKBIB: YOU WERE.

(FROM ORIGINAL PAGE 19)

A PROSPECTIVE JUROR: YES.

MR. MEKBIB: THANK YOU, I HAVE NO FURTHER QUESTIONS.

THE COURT: WHY WERE YOU UNHAPPY?

A PROSPECTIVE JUROR: I WAS NOT UNHAPPY. I WAS PLEASED. I'M SORRY, I MUST HAVE MISUNDERSTOOD YOU.

MR. MEKBIB: YOU WERE HAPPY WITH THE EDUCATION YOU RECEIVED THERE?

A PROSPECTIVE JUROR: YES.

MR. MEKBIB: WOULD THAT BIAS YOUR VIEWS ABOUT THE PLAINTIFF'S CAUSES AGAINST THE DEFENDANT?

A PROSPECTIVE JUROR: WELL, I DON'T THINK I CAN ANSWER THAT WITHOUT KNOWING MORE ABOUT IT BUT I DOUBT THAT WOULD.

THE COURT: WOULD YOU BE ABLE TO FOLLOW THE INSTRUCTIONS AND DECIDE THIS CASE ON THE FACTS AND THE LAW AS THEY'RE DEVELOPED IN THE COURTROOM?

A PROSPECTIVE JUROR: WELL, YES, I HOPE SO. I THINK SO.

THE COURT: THANK YOU.

MR. MEKBIB: YOUR HONOR, I MUST OBJECT TO THIS WITNESS.

THE COURT: MAKE YOUR OBJECTIONS AT THE BENCH, AND YOUR OBJECTION IS OVERRULED. YOU MAY BE SEATED.

NOW, IF YOU'D COME TO THE BENCH I'LL SEE

FROM ORIGINAL PAGE 20)

THESE PARTICULAR PEOPLE AT THE BENCH.

(BENCH CONFERENCE).

THE COURT: TELL ME AGAIN WHAT -- YOU HAVE A RELATIVE WHO WORKS AT THE UNIVERSITY.

A PROSPECTIVE JUROR: MY WIFE USED TO WORK THERE. SHE WAS A HOUSEKEEPER.

THE COURT: AT THE UNIVERSITY OR AT THE HOSPITAL.

A PROSPECTIVE JUROR: AT THE HOSPITAL.

THE COURT: AND SHE WAS THERE FOR HOW LONG?

A PROSPECTIVE JUROR: I THINK SHE WAS THERE FOR MAYBE EIGHT YEARS.

THE COURT: EIGHT YEARS.

A PROSPECTIVE JUROR: YES.

THE COURT: AND WHY DID SHE LEAVE?

A PROSPECTIVE JUROR: SHE GOT FIRED. TERMINATED.

THE COURT: AND DO YOU KNOW WHY?

A PROSPECTIVE JUROR: YES. SHE GOT INTO AN ALTERCATION WITH A NURSE AND THEY BOTH GOT TERMINATED.

THE COURT: BOTH WERE TERMINATED?

A PROSPECTIVE JUROR: BOTH WERE TERMINATED.

THE COURT: DO YOU THINK THAT SHE WAS TREATED

UNFAIRLY?

A PROSPECTIVE JUROR: YES, BECAUSE SHE FILED

(FROM ORIGINAL PAGE 21

A SUIT AND IT WENT THROUGH A CLASS ACTION BUT THEY RULED AGAINST HER.

THE COURT: SHE BROUGHT IT IN COURT.

A PROSPECTIVE JUROR: EQUAL OPPORTUNITY.

THE COURT: EEOC.

A PROSPECTIVE JUROR: EEOC. RIGHT. SHE WENT FOR A HEARING AND THEY VOTED AGAINST HER.

THE COURT: DO YOU THINK THAT THE DECISION THEY ENTERED WAS UNFAIR?

A PROSPECTIVE JUROR: YES.

THE COURT: ALL RIGHT.

DOES EITHER COUNSEL WISH TO INQUIRE.

MR. MEKBIB: I HAVE NO FURTHER QUESTIONS.

THE COURT: DO YOU WANT TO STEP OVER THERE BY THE BOX, SIR?

MR. FRAZIER: I WOULD ASK, YOUR HONOR, THAT THIS WITNESS BE DISQUALIFIED FOR CAUSE.

THE COURT: YES, TELL HIM QUIETLY -- JUST WALK OVER THERE AND TELL HIM TO GO BACK TO THE

JURY LOUNGE.

THE NEXT PERSON, PLEASE.

COME UP HERE, PLEASE, MA'AM, AROUND HERE.

THE DEPUTY CLERK: STAND RIGHT HERE, PLEASE, MA'AM.

THIS IS 3253.

(FROM ORIGINAL PAGE 22)

A PROSPECTIVE JUROR: YES. RIGHT HERE? YES, GOOD MORNING.

THE COURT: DO YOU WANT TO TELL ME MORE ABOUT WHAT YOU SAID? IS IT YOUR MOTHER WHO IS WORKING THERE?

A PROSPECTIVE JUROR: SHE WORKS AT GILMAN'S LIBRARY. SHE WORKS AT HOUSEKEEPING.

THE COURT: AND THIS WAS THE UNIVERSITY LIBRARY, NOT THE HOSPITAL.

A PROSPECTIVE JUROR: UNIVERSITY HOSPITAL.

THE COURT: AND SHE DOESN'T WORK THERE NOW.

A PROSPECTIVE JUROR: YES, SHE DOES.

THE COURT: DO YOU KNOW WHETHER SHE'S SATISFIED OR DISSATISFIED.

A PROSPECTIVE JUROR: SHE'S GOING THROUGH A

LITTLE PROBLEM TRYING TO GET OUT ON DISABILITY OR SOMETHING LIKE THAT.

THE COURT: SHE'S TRYING TO ESTABLISH THAT SHE'S DISABLED AT WORK, IS IT THAT?

A PROSPECTIVE JUROR: YES.

THE COURT: AND FOR COMPENSATION.

A PROSPECTIVE JUROR: YES.

THE COURT: AND WHO IS SHE DEALING WITH, THE HOSPITAL OR SOMEBODY ELSE?

A PROSPECTIVE JUROR: WITH PERSONNEL AND - SHE'S ALSO TRYING TO GET HER SOCIAL SECURITY.

(FROM ORIGINAL PAGE 23)

SHE'S DEALING WITH THEM ALSO. I DON'T THINK THE HOSPITAL.

THE COURT: HOW OLD IS SHE, IF YOU DON'T MIND TELLING ME. JUST IN THE BALLPARK.

A PROSPECTIVE JUROR: SHE'LL BE 60 SATURDAY.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THAT SHE IS BEING TREATED UNFAIRLY BY THE UNIVERSITY?

A PROSPECTIVE JUROR: WELL, SHE'S BEEN -- NOT REALLY, BUT SHE THINKS SHE HAS BECAUSE SHE'S

BEEN OUT SICK AND THEY'VE BEEN WRITING HER UP YOU FOR, YOU KNOW, TRYING TO GET HER FIRED AND ALL THAT STUFF BECAUSE SHE'S BEEN OUT A LOT SICK BECAUSE SHE FELL ON THE JOB AND YOU, KNOW, WHEN YOU FALL YOU'RE SUPPOSED TO GET COMPENSATION OR WHATEVER. THEY DIDN'T GIVE HER COMPENSATION, SO THAT'S WHY SHE'S TRYING TO GET AWAY FROM THERE.

THE COURT: DOES EITHER COUNSEL HAVE ANY QUESTIONS?

MR. MEKBIB: I HAVE NO FURTHER QUESTIONS FOR HER.

MR. FRAZIER: YOUR MOTHER HAD A WORKERS COMPENSATION CLAIM.

A PROSPECTIVE JUROR: YES.

MR. FRAZIER: AND THAT WAS DENIED.

A PROSPECTIVE JUROR: SHE NEVER RECEIVED HER MONEY FOR IT.

MR. FRAZIER: SHE NEVER RECEIVED MONEY FROM

(FROM ORIGINAL PAGE 24)

THE UNIVERSITY.

A PROSPECTIVE JUROR: NO.

MR. FRAZIER: AND SHE WAS UPSET ABOUT THAT.

A PROSPECTIVE JUROR: YES.

MR. FRAZIER: AND SHE'S TALKED TO YOU ABOUT THAT.

A PROSPECTIVE JUROR: SHE'S SHOWN ME THE PAPERWORK AND EVERYTHING.

MR. FRAZIER: SHE'S BEEN TRYING TO RETIRE ON DISABILITY.

A PROSPECTIVE JUROR: YES.

MR. FRAZIER: AND THE UNIVERSITY DOESN'T THINK SHE'S DISABLED.

A PROSPECTIVE JUROR: SHE HAS TO GO TO A MEETING THIS MORNING. I DON'T KNOW WHAT THE OUTCOME WILL BE.

MR. FRAZIER: DOES IT APPEAR AT THIS POINT THAT THEY ARE GOING ALONG WITH THAT OR THAT THEY ARE NOT GOING ALONG WITH THAT?

A PROSPECTIVE JUROR: I THINK THEY ARE GOING ALONG WITH HER BUT SHE'S NOT HAVING ANY PATIENCE AND, YOU KNOW, SHE'S JUST TRYING TO -- IT SEEMS LIKE SHE'S TRYING TO RUSH THINGS AND THEY'RE GOING ABOUT IT TOO SLOWLY I GUESS FOR HER BUT I THINK THEY'RE TRYING TO, YOU KNOW, BECAUSE IF

THEY WASN'T THEY WOULDN'T HAVE HER

(FROM ORIGINAL PAGE 25)

GOING TO MEETINGS AND SENDING HER FORMS IN THE MAIL.

MR. FRAZIER: DO YOU FEEL THAT THE UNIVERSITY TREATED HER -- YOUR MOTHER UNFAIRLY WITH DENIAL OF THE WORKERS COMPENSATION CLAIM? A PROSPECTIVE JUROR: YES, BECAUSE SHE FELL AND HURT HER BACK. NO, SHE FELL AND HURT HER KNEE, SORRY. AND THEN THEY SERVED HER THESE PAPERS TELLING HER SHE'LL BE SUSPENDED OR FIRED AND SHE NEVER GOT PAID FOR THE, YOU KNOW, WHEN SHE FELL AND HURT HER LEG. SO I THINK THAT WAS UNFAIR, YOU KNOW, AND SHE WAS OUT OF WORK BECAUSE MAINLY OF HER LEG AND PLUS SHE HAS HIGH BLOOD PRESSURE AND THAT'S WHY ONE -- TWO OF THE REASONS SHE'S BEEN OUT. SO I THINK THEY HAVE. THEY WON'T SLAP HER WITH THE PAPERS TERMINATING HER BECAUSE SHE'S BEEN OUT BECAUSE OF HER LEG BUT YET NOT PAID HER.

MR. FRAZIER: I HAVE NO FURTHER QUESTIONS.

THE COURT: DO YOU MIND STEPPING OVER THERE?

MR. FRAZIER: YOUR HONOR, I WOULD ASK THAT

THIS WITNESS BE DISQUALIFIED FOR CAUSE.

MR. MEKBIB: I AGREE WITH HIM.

THE COURT: THE NEXT PERSON, PLEASE?

YOUR NUMBER PLEASE,, SIR?

A PROSPECTIVE JUROR: 4098.

THE COURT: AND WHAT WAS YOUR ANSWER TO MY QUESTION?

(FROM ORIGINAL PAGE 26

A PROSPECTIVE JUROR: I WORK FOR THE DEPARTMENT OF HEALTH CARE SCIENCES IN THE ACC BUILDING. IT'S RIGHT ACROSS THE STREET FROM THE MEDICAL CENTER.

THE COURT: AND DO YOU WORK IN THE MEDICAL CENTER? DOES IT TAKE YOU IN THERE?

A PROSPECTIVE JUROR: TIME TO TIME. NOT FOR ANYTHING REALLY SIGNIFICANT.

THE COURT: DOES YOUR WORK INVOLVE -- HAVE TO DO WITH THE PEOPLE WHO WORK THERE?

A PROSPECTIVE JUROR: FROM TIME FOR TIME. NOT ALWAYS.

THE COURT: DO YOU HAVE AN IMPRESSION OF THE EMPLOYMENT SITUATION THERE, WORKING CONDITIONS

AND THAT SORT OF THING?

A PROSPECTIVE JUROR: NOT REALLY.

THE COURT: DOES EITHER COUNSEL HAVE ANY QUESTIONS FOR THIS GENTLEMAN?

MR. FRAZIER: YOUR HONOR, THERE ARE QUESTIONS THAT WOULD BE ASKED LATER IN THE VOIR DIRE.

THE COURT: WHY DON'T YOU ASK THEM NOW. ASK THEM OF HIM NOW.

MR. FRAZIER: OKAY. HAVE YOU EVER BEEN INVOLVED IN AN EMPLOYMENT DISPUTE WITH GEORGE WASHINGTON UNIVERSITY?

A PROSPECTIVE JUROR: NO.

(FROM ORIGINAL PAGE 27)

MR. FRAZIER: HAS ANYBODY THAT YOU'VE WORKED WITH BEEN INVOLVED IN AN EMPLOYMENT DISPUTE?

A PROSPECTIVE JUROR: NO.

MR. FRAZIER: HAS ANYBODY YOU KNEW BEEN INVOLVED IN AN EMPLOYMENT DISPUTE WITH SOMEBODY ELSE, SOME OTHER EMPLOYER?

A PROSPECTIVE JUROR: NONE AT ALL.

THE COURT: I THOUGHT YOU HAD FURTHER QUESTIONS RELATED SPECIFICALLY TO HIS

RELATIONSHIP TO THE UNIVERSITY.

MR. FRAZIER: OH, YES, YOUR HONOR.

THE COURT: ARE THERE ANY OF THOSE?

MR. FRAZIER: I'LL JUST ASK WITH RESPECT TO THE UNIVERSITY. DO YOU HAVE ANY FAMILIARITY WITH ANY OF THE PEOPLE THAT ARE IN THE EMPLOYMENT DIVISION, THE PEOPLE WHO DO THE HIRING AT GEORGE WASHINGTON UNIVERSITY?

A PROSPECTIVE JUROR: NO, SIR.

MR. FRAZIER: HOW LONG HAVE YOU BEEN EMPLOYED BY GW?

A PROSPECTIVE JUROR: 18 MONTHS.

MR. FRAZIER: SO YOU'RE NOW A PERMANENT EMPLOYEE.

A PROSPECTIVE JUROR: YES.

MR. FRAZIER: I HAVE NO FURTHER QUESTIONS.

(FROM ORIGINAL PAGE 28)

THE COURT: ARE YOU SATISFIED WITH YOUR JOB?

A PROSPECTIVE JUROR: IT'S TREATING ME GOOD SO FAR.

THE COURT: ALL RIGHT. DO YOU HAVE ANY FURTHER QUESTIONS?

MR. MEKBIB: SO YOU WORK FOR THEM. YOU GET PAID BY THE UNIVERSITY, IS THAT CORRECT?

A PROSPECTIVE JUROR: I'M EMPLOYED BY THEM.

MR. MEKBIB: AND YOU'RE HAPPY WITH YOUR JOB?

A PROSPECTIVE JUROR: I'M CONTENT.

MR. MEKBIB: WHAT IS THE POSITION YOU HAVE THERE?

A PROSPECTIVE JUROR: I'M A MEDICAL SECRETARY.

MR. MEKBIB: AND YOU'RE HAPPY WITH THAT.

A PROSPECTIVE JUROR: I'M CONTENT.

MR. MEKBIB: WAS THAT A PROMOTION TO ANY PREVIOUS POSITION YOU HAD, WAS THAT AN ADVANCEMENT ON YOUR PREVIOUS EMPLOYMENT?

A PROSPECTIVE JUROR: NO, HIRED.

MR. MEKBIB: THANK YOU, I HAVE NO OTHER QUESTIONS.

THE COURT: STEP OVER THERE, PLEASE.

MR. MEKBIB: YOUR HONOR, I MUST SEEK DISQUALIFICATION.

THE COURT: HE'LL HAVE TO BE EXCUSED.

MR. FRAZIER: I HAVE NO OBJECTION YOUR HONOR.

THE COURT: YOU ALL CAN GO BACK TO THE WELL OF THE COURT NOW.

MR MEKBIB: THANK YOU.

(BENCH CONFERENCE CONCLUDED).

THE COURT: DO ANY OF YOU OR ANY OF YOUR CLOSE FAMILY MEMBERS HAVE TRAINING IN THE LAW, PRACTICE LAW?

WOULD YOU PLEASE COME TO THE AISLE, MA'AM?

A PROSPECTIVE JUROR: 3275.

THE COURT: YES, MA'AM.

A PROSPECTIVE JUROR: AND MY COUSIN IN MINNEAPOLIS PRACTICES LAW.

THE COURT: ALL RIGHT. THANK YOU VERY MUCH. YOU MAY BE SEATED.

IS ANYONE HERE WHO HAS BEEN HOSPITALIZED OR TREATED AS A PATIENT AT GW?

IF YOU WILL COME BACK AGAIN, I'M SORRY.

JUROR 3275: I'VE BEEN A PATIENT AT GW HOSPITAL AND MY DOCTOR IS ON THE STAFF.

THE COURT: HOW LONG AGO WERE YOU TREATED THERE?

A PROSPECTIVE JUROR: WITHIN THE LAST TEN YEARS.

THE COURT: WERE YOU HOSPITALIZED OR AN OUTPATIENT?

(FROM ORIGINAL PAGE 30)

A PROSPECTIVE JUROR: I HAD AN OPERATION.

THE COURT: WELL, I THINK I'LL ASK YOU TO BE SEATED IN FRONT AND I'LL TALK TO YOU UP HERE IN A FEW MINUTES.

A PROSPECTIVE JUROR: 2737.

THE COURT: YES, MA'AM.

A PROSPECTIVE JUROR: I WAS AN OUTPATIENT AT GW IN THE LAST EIGHT MONTHS.

THE COURT: DID YOU HAVE A CHANCE TO OBSERVE THE EMPLOYEES AND EMPLOYMENT PRACTICES AT THE TIME YOU WERE THERE?

YES, YOUR HONOR.

THE COURT: WILL YOU BE SEATED UP IN THE FRONT THERE?

A PROSPECTIVE JUROR: 4010.

THE COURT: YES, MA'AM.

A PROSPECTIVE JUROR: MY SON HAD SURGERY AT GW IN 1989 AND IS CURRENTLY STILL BEING TREATED THERE.

THE COURT: WERE YOU THERE WHEN HE WAS HOSPITALIZED?

A PROSPECTIVE JUROR: YES, I WAS.

THE COURT: DID YOU HAVE AN OPPORTUNITY TO OBSERVE THE EMPLOYMENT PRACTICES THERE?

A PROSPECTIVE JUROR: YES, I DID.

THE COURT: WILL YOU BE SEATED UP FRONT?

(FROM ORIGINAL PAGE 31

A PROSPECTIVE JUROR: 4045.

THE COURT: YES, MA'AM.

A PROSPECTIVE JUROR: I WAS TREATED IN THE EMERGENCY ROOM AT GW TWO MONTHS AGO.

THE COURT: HOW LONG WERE YOU THERE?

A PROSPECTIVE JUROR: JUST FOR FIVE OR SIX HOURS.

THE COURT: DID YOU HAVE AN OPPORTUNITY THERE TO OBSERVE IN THAT TIME THE WORKING ARRANGEMENTS?

A PROSPECTIVE JUROR: YES.

THE COURT: WHY DON'T YOU HAVE A SEAT IN THE FRONT ROW.

NOW, COUNSEL IF YOU WOULD COME UP AND THE FIRST LADY PLEASE, MA'AM. THE LADY IN THE BLUE SWEATER.

(BENCH CONFERENCE)

THE DEPUTY CLERK: THE NUMBER IS 3275.

THE COURT: WERE YOU SATISFIED WITH THE MEDICAL SERVICE YOU RECEIVED AT THE HOSPITAL?

A PROSPECTIVE JUROR: YES.

THE COURT: AND WHAT WERE YOUR OBSERVATIONS ABOUT THE PEOPLE WHO WORKED THERE, IF ANY?

A PROSPECTIVE JUROR: THEY WERE SHORT STAFFED.

THE COURT: YES? AND THE ONES WHO WERE THERE, WERE THEY SATISFACTORY?

YES.

(FROM ORIGINAL PAGE 32)

THE COURT: DO COUNSEL HAVE ANY QUESTIONS?

MR. MEKBIB? MR. MEKBIB: YOU WERE HAPPY WITH THE TREATMENT YOU RECEIVED, CORRECT?

A PROSPECTIVE JUROR: YES.

MR. MEKBIB: YOU WERE HAPPY WITH THE DOCTORS THAT YOU HAD, CORRECT?

A PROSPECTIVE JUROR: YES.

MR. MEKBIB: I HAVE NO FURTHER QUESTIONS.

MR. FRAZIER: I HAVE NO QUESTIONS, YOUR HONOR.

THE COURT: YOU MAY BE SEATED OVER BY THE JURY BOX. STAND OVER THERE JUST A MINUTE.

MR. MEKBIB: I MOVE TO DISQUALIFY, YOUR HONOR.

THE COURT: I THINK WE'LL HAVE TO ELIMINATE PEOPLE WHO HAVE BEEN PATIENTS THERE.

MR. FRAZIER: WELL, I DISAGREE, YOUR HONOR, BUT I DON'T THINK THAT IT WOULD AFFECT HER TESTIMONY - HER DECISION WITH REGARD TO THIS DISCRIMINATION CLAIM.

THE COURT: THAT BRINGS UP A QUESTION. I SHOULD HAVE TOLD YOU THIS BEFORE. BUT I WAS A PATIENT AT GW HOSPITAL SOME THREE YEARS AGO.

I DON'T KNOW WHETHER I BROUGHT THIS UP BEFORE, BUT IT SHOULD BE BROUGHT UP. I DON'T

CONSIDER IT A DISQUALIFYING FACTOR.

(FROM ORIGINAL PAGE 33)

MR. MEKBIB: WELL, YOUR HONOR, THAT WOULDN'T CONCERN ME SO LONG -

THE COURT: DON'T SAY ANYTHING NOW. I AN NOT GOING TO RECUSE MYSELF. YOU MAY NEED THIS ON APPEAL. THE DECISION ABOUT WHETHER IT IS DISQUALIFYING IS MINE. YOU DON'T WAIVE ANY CLAIM ABOUT IT, BUT I WANT YOU TO KNOW IT.

MR.MEKBIB: THANK YOU, YOUR HONOR.

THE COURT: IT SEEMS TO ME A JURY IS IN A DIFFERENT SITUATION, JURORS ARE IN A DIFFERENT SITUATION. I THINK PEOPLE WHO HAVE -- THERE MUST BE ENOUGH PEOPLE IN THIS TOWN WHO HAVE NOT BEEN EMPLOYED BY OR PATIENTS OF THE HOSPITAL AND CAN LOOK AT THIS IN A FRESH WAY. I'M GOING TO EXCUSE THIS LADY.

MR. MEKBIB: THANK YOU, YOUR HONOR.

THE COURT: WE MAY HAVE TO SEAT ANOTHER PANEL ANOTHER DAY. WE WON'T BE ABLE TO START.

THE DEPUTY CLERK: THE NEXT PERSON?

THIS IS JUROR 2737

STAND RIGHT THERE, PLEASE.

THE COURT: WHAT IS YOUR EXPERIENCE AGAIN?

A PROSPECTIVE JUROR: I WAS AN OUTPATIENT AT GW. MY HUSBAND WAS ALSO, WITHIN THE LAST EIGHT MONTHS.

THE COURT: AN OUTPATIENT.

(FROM ORIGINAL PAGE 34)

A PROSPECTIVE JUROR: YES.

THE COURT: HOW LONG WERE YOU THERE?

A PROSPECTIVE JUROR: JUST IN AND OUT. I WENT IN FOR A ROUTINE CHECK-UP, ROUTINE TESTS I HAD TO HAVE RUN ON MYSELF AND --

THE COURT: FOR HOW LONG WERE YOU THERE, HOW LONG WAS YOUR APPOINTMENT? WERE YOU PUT TO BED?

A PROSPECTIVE JUROR: OH, NO.

THE COURT: OKAY. ANYTHING ABOUT THAT EXPERIENCE THAT GAVE YOU AN OCCASION TO OBSERVE THE RELATIONSHIP BETWEEN PEOPLE WHO WORK THERE IN THE HOSPITAL?

A PROSPECTIVE JUROR: YES, I SAW INTERACTION AND DISCUSSIONS.

THE COURT: LIKE WHAT?

A PROSPECTIVE JUROR: WELL, DIRECTIONS FROM THE STAFF, SUPERIOR STAFF.

THE COURT: ANYTHING UNUSUAL ABOUT IT?

A PROSPECTIVE JUROR: NO.

THE COURT: ALL RIGHT. WHY DON'T YOU STEP OVER -- I'M SORRY, GENTLEMEN. DO EITHER OF HAVE YOU ANY QUESTIONS?

MR. MEKBIB: WERE YOU HAPPY WITH THE MEDICAL TREATMENT YOU RECEIVED?

A PROSPECTIVE JUROR: YES.

(FROM ORIGINAL PAGE 35)

MR. MEKBIB: WAS YOUR HUSBAND TREATED WELL, WERE YOU HAPPY WITH THAT?

A PROSPECTIVE JUROR: WELL, HE WASN'T HAPPY WITH SOME OF THE TREATMENT THAT HE EXPERIENCED. HE BROKE TWO BONES IN HIS ANKLE AND I HAD TO TAKE HIM UP TO THE EMERGENCY ROOM AND WE WAITED A LONG TIME AND HE WAS GIVEN DIFFERENT SETS OF INFORMATION ABOUT HIS TREATMENT AND HOW LONG HE WOULD BE DETAINED THERE BY TWO DIFFERENT DOCTORS AND HE WAS NOT HAPPY WITH THAT UNTIL THE ISSUE WAS RESOLVED.

MR. MEKBIB: BUT THAT ISSUE WAS RESOLVED.

A PROSPECTIVE JUROR: YES.

MR. MEKBIB: THEN HE WAS HAPPY.

A PROSPECTIVE JUROR: HE WAS -- HE WASN'T HAPPY THAT HE HAD TO SIT THERE AND WAIT THROUGH THE LONG PROCESS BEFORE IT WAS RESOLVED, BUT WITH THE OUTCOME, YES, HE WAS. I'VE BEEN WITH THE ORGANIZATION A LONG TIME SO IT'S NOTHING THAT --

MR. MEKBIB: WITH WHAT ORGANIZATION?

A PROSPECTIVE JUROR: GEORGE WASHINGTON HEALTH FOR YEARS, AND IT'S JUST DIFFERENT CIRCUMSTANCES, BUT I HAVE-

THE COURT: LET ME ASK YOU THIS, WOULD THOSE EXPERIENCES IMPAIR YOUR ABILITY TO DECIDE THIS CASE ON THE FACTS ABOUT MISS SCALES' SITUATION

(FROM ORIGINAL PAGE 36)

AND THE HOSPITAL'S EMPLOYMENT PRACTICES ON THE BASIS OF WHAT YOU HEAR IN THE COURTROOM AS DISTINGUISHED FROM WHAT YOU MIGHT HAVE LEARNED SITTING AROUND THERE?

A PROSPECTIVE JUROR: NO.

THE COURT: WHY DON'T YOU STEP ASIDE A MOMENT?

LET ME ASK YOU THIS, GENTLEMEN, ISN'T THERE A GOOD REASON TO DRAW A LINE BETWEEN SOMEBODY WHO HAS BEEN THERE AS AN OUTPATIENT AND SOMEBODY WHO HAS BEEN HOSPITALIZED AND HAD OCCASION TO REALLY OBSERVE NURSING CARE AND NURSES OPERATING?

MR. MEKBIB: THERE MAY BE, THOUGH IN THIS PARTICULAR SETTING I SEE DIFFERENT THINGS. HER COUSIN IS AN EMPLOYEE OF THE UNIVERSITY.

THE COURT: I DIDN'T HEAR THAT.

MR. MEKBIB: YES.

THE COURT: LET ME ASK HER THAT.

THE DEPUTY CLERK: MA'AM, CAN YOU COME BACK HERE?

THE COURT: DO I UNDERSTAND THAT THERE'S ALSO A RELATIVE OF YOURS EMPLOYED THERE?

A PROSPECTIVE JUROR: YES.

THE COURT: WHAT IS HE OR SHE EMPLOYED AS?

A PROSPECTIVE JUROR: WELL, I'M NOT SURE OF HER TITLE BUT I BELIEVE SHE WORKS IN A CLERICAL

CAPACITY.

THE COURT: HOW LONG HAS SHE BEEN THERE?

A PROSPECTIVE JUROR: SEVERAL YEARS.

THE COURT: AND DO YOU TALK TO HER ABOUT HER WORK?

A PROSPECTIVE JUROR: NO, I DON'T.

THE COURT: DO YOU TALK TO HER ABOUT THE SITUATION THERE AT ALL?

A PROSPECTIVE JUROR: NO, I DON'T.

THE COURT: IS THERE ANY OTHER RELATIONSHIP THAT YOU WANT TO INQUIRE ABOUT?

MR. MEKBIB: YOUR HEALTH PLAN IS WITH GEORGE WASHINGTON.

A PROSPECTIVE JUROR: YES, GEORGE WASHINGTON HEALTH PLAN.

MR. MEKBIB: HOW LONG DID YOU HAVE THAT HEALTH PLAN?

A PROSPECTIVE JUROR: I KNOW AT LEAST TEN YEARS.

MR. MEKBIB: IS IT A PLAN THAT HAS BEEN SUBSCRIBED TO BY YOUR EMPLOYER OR IS IT A

PRIVATE PLAN THAT YOU HAVE?

A PROSPECTIVE JUROR: IT'S A PLAN -- I WORK FOR THE DISTRICT GOVERNMENT SO IT'S A PLAN THROUGH THEM.

MR. MEKBIB: I SEE. THANK YOU.

(FROM ORIGINAL PAGE 38)

THE COURT: THANK YOU. WOULD YOU GO BACK THERE, MA'AM?

MR. MEKBIB: YOUR HONOR, IT SEEMS TO ME THAT WORKING FOR THE DISTRICT GOVERNMENT WITH THE MULTITUDE OF OPTIONS, MEDICAL CARE PLANS SHE HAS, SHE CHOSE THE GEORGE WASHINGTON UNIVERSITY. SHE OBVIOUSLY HAS INCLINATIONS, THOUGH SHE MAY NOT BE CONSIDERED AS BIASED, THAT IS OBVIOUSLY -- THAT IS THAT CONTACT AND LEANING WHICH IS ONGOING AND DIFFERENT IN MY VIEW TO LEAD TO DISQUALIFY THIS PERSON.

MR. FRAZIER: I HAVE NO OBJECTION.

THE COURT: LET HER GO.

WILL THE NEXT PERSON COME BACK, PLEASE?

ARE EITHER OF THE TWO SPECTATORS WITNESSES?

MR. FRAZIER: DR. WORK IS MR. MEKBIB'S WITNESS.

THE COURT: IS THAT A WITNESS SITTING THERE?

MR. MEKBIB: YES.

THE COURT: LET'S HAVE A RULE ON WITNESSES.

THE DEPUTY CLERK: IF THERE'S ANY PERSON IN THE COURTROOM WHO WILL BE APPEARING AS A WITNESS IN THIS MATTER PLEASE STEP INTO THE HALLWAY.

THIS IS JUROR NUMBER 4010.

THE COURT: YES, MA'AM.

(FROM ORIGINAL PAGE 39)

A PROSPECTIVE JUROR: OKAY. MY SON WAS HOSPITALIZED AT GW IN 1989.

THE COURT: YES, AND WERE YOU THERE A GOOD DEAL WHILE HE WAS THERE?

A PROSPECTIVE JUROR: YES.

THE COURT: DID YOU HAVE OCCASION TO OBSERVE THE WORK OF THE STAFF?

A PROSPECTIVE JUROR: YES, I DID.

THE COURT: WERE YOU SATISFIED WITH THE WAY THEY WORK?

A PROSPECTIVE JUROR: YES, I WAS.

THE COURT: AND DID YOU OBSERVE THE RELATIONSHIP BETWEEN THE STAFF AND THE MANAGEMENT AT ALL?

A PROSPECTIVE JUROR: THE STAFF AND THE MANAGEMENT?

THE COURT: YES.

A PROSPECTIVE JUROR: NO.

THE COURT: DO COUNSEL HAVE ANY QUESTIONS?

MR. MEKBIB: WHAT KIND OF MEDICAL NECESSITY DID YOUR SON HAVE? WHAT WAS THE REASON WHY YOUR SON WENT THERE?

A PROSPECTIVE JUROR: HE HAD A PITUITARY TUMOR.

THE COURT: HOW LONG WAS HE HOSPITALIZED?

(FROM ORIGINAL PAGE 40)

A PROSPECTIVE JUROR: OH, MAY 22ND, 1989 UNTIL JUNE, JUNE THE 3RD OR THE 4TH, '89. THEN HE WENT BACK IN FOR ABOUT 30 DAYS ON JUNE THE 7TH AROUND THE 1ST OF JULY, '89 AND NOW HE'S GOING FOR TREATMENT ONLY.

THE COURT: HE WASN'T IN BED ALL THAT TIME.

A PROSPECTIVE JUROR: HE WASN'T IN BED?

THE COURT: I MEAN HE WASN'T HOSPITALIZED ALL THAT TIME, OR WAS HE?

A PROSPECTIVE JUROR: HE WAS HOSPITALIZED FROM MAY THE 22ND, '89 UNTIL JUNE THE 3RD OR 4TH, '89.

THE COURT: FOR THE 30 DAYS, WAS HE ALSO HOSPITALIZED FOR THE 30 DAYS?

A PROSPECTIVE JUROR: YES.

THE COURT: HE WAS ACTUALLY IN BED IN THE HOSPITAL.

A PROSPECTIVE JUROR: YES.

THE COURT: AND YOU VISITED HIM.

A PROSPECTIVE JUROR: EVERY DAY, ALL DAY LONG, UNTIL THEY PUT ME OUT.

THE COURT: THANK YOU. MA'AM.

DO YOU HAVE ANY FURTHER QUESTIONS?

MR. MEKBIB: NO.

THE COURT: DO YOU WANT TO STEP OVER THERE.

WHAT'S YOUR FEELING ABOUT THAT?

MR. MEKBIB: CLEARLY, YOUR HONOR, SHE HAS A

PASSIONATE ATTACHMENT TO THE HOSPITAL.

THE COURT: THAT'S A LITTLE OVERSTATEMENT, BUT I'LL HAVE TO HONOR YOUR MOTION.

MR. QUINN: SHE'S DISQUALIFIED?

THE COURT: THE NEXT PERSON, PLEASE?

WHY DON'T YOU TRY TO FIND OUT IF THERE'S ANOTHER PANEL UP THERE?

THE DEPUTY CLERK: COME RIGHT OVER HERE, MA'AM. AND THIS IS JUROR NUMBER 4045.

THE COURT: YES, MA'AM.

A PROSPECTIVE JUROR: I JUST WENT INTO THE EMERGENCY ROOM.

THE COURT: HOW LONG?

A PROSPECTIVE JUROR: TWO MONTHS AGO. I HAD A BROKEN TOE.

THE COURT: FOR HOW LONG WERE YOU THERE?

A PROSPECTIVE JUROR: MAYBE FIVE HOURS IN THE EMERGENCY ROOM.

THE COURT: AND DID YOU HAVE OCCASION TO OBSERVE THE RELATIONSHIP BETWEEN THE STAFF AND THE MANAGEMENT?

A PROSPECTIVE JUROR: NO, NO, YOUR HONOR.

THE COURT: ANY QUESTIONS BY EITHER COUNSEL?

MR. FRAZIER: DID YOU -- WERE YOU HAPPY WITH THE TREATMENT YOU RECEIVED?

(FROM ORIGINAL PAGE 42)

A PROSPECTIVE JUROR: YES.

MR. FRAZIER: DID YOU THINK THAT IT WAS UNREASONABLE FOR YOU TO HAVE TO BE THERE FOR FIVE OR SIX HOURS TO HAVE YOUR TOE TREATED?

A PROSPECTIVE JUROR: I THOUGHT IT WAS A LONG TIME.

MR. FRAZIER: WOULD THAT AFFECT YOUR DECISION IN THIS CASE?

A PROSPECTIVE JUROR: NO.

THE COURT: MR. MEKBIB?

MR. MEKBIB: IF YOU WERE TO HAVE, GOD FORBID, ANOTHER EMERGENCY, WOULD YOU BE GOING BACK TO THAT HOSPITAL?

A PROSPECTIVE JUROR: I DIDN'T UNDERSTAND THE QUESTION.

MR. MEKBIB: IF YOU, GOD FORBID, IF YOU HAVE ANOTHER EMERGENCY, WOULD YOU GO BACK TO THAT

HOSPITAL?

A PROSPECTIVE JUROR: YES, I WOULD.

MR. MEKBIB: FOR TREATMENT.

A PROSPECTIVE JUROR: YES.

MR. MEKBIB: SO YOU ARE CONTENT WITH THE SERVICE YOU RECEIVED THERE.

A PROSPECTIVE JUROR: YES.

THE COURT: YOU MAY BE SEATED OVER THERE JUST A MOMENT, MA'AM.

(FROM ORIGINAL PAGE 43)

HOW DO YOU FEEL ABOUT THAT?

MR. MEKBIB: I THINK THE SAFEST APPROACH WOULD BE TO EXCLUDE HER.

THE COURT: IT SEEMS TO ME HER -- THAT'S A MARGINAL CONTACT. SHE DIDN'T SORT OF LIVE THERE AND REALLY DIDN'T HAVE OCCASION TO OBSERVE THE WORKING ARRANGEMENTS. THE FACT -- IT'S LIKE SAYING THAT SOMEBODY CAN'T BE INVOLVED IN A LAWSUIT INVOLVING WOODWARD & LOTHROP BECAUSE THEY BOUGHT A DRESS THERE AND WERE DISSATISFIED WITH IT. THE MOTION IS DENIED WITH RESPECT TO THIS JUROR.

THE DEPUTY CLERK: MA'AM, YOU CAN TAKE YOUR SEAT IN COURT.

THE COURT: OKAY. WHY DON'T YOU STEP ASIDE WITHOUT TAKING YOUR SEAT AND LET'S SEE WHAT WE GET HERE. JUST GIVE ME A LITTLE ROOM.

(BENCH CONFERENCE CONCLUDED).

THE COURT: DOES ANYONE HERE HAVE A JOB ADMINISTERING CLAIMS AS IN AN INSURANCE COMPANY OR FOR A GOVERNMENT AGENCY? I TAKE IT THAT NONE DOES.

HAS ANYBODY HERE BEEN HIMSELF OR HERSELF OR HAVE A CLOSE FAMILY MEMBER OR CHOICE FRIEND WHO HAS BEEN INVOLVED IN AN INFORMAL OR FORMAL ADMINISTRATIVE OR JUDICIAL PROCEEDING INVOLVING A CLAIM OF DISCRIMINATION, DISCRIMINATION BASED ON AGE OR GENDER OR RACE OR QUESTIONS THAT ARE

(FROM ORIGINAL PAGE 52)

BEING ASKED. I'LL ASK YOU TO AVOID COMING IN ANY CONTACT WITH ANY OF THE PEOPLE YOU SEE IN THE ROOM HERE AND THEY WILL AVOID CONTACT WITH YOU. WE DON'T WANT ANY CONVERSATION BETWEEN A JUROR AND A LAWYER OR POTENTIAL WITNESS. THERE'S A

POTENTIAL WITNESS OUTSIDE. BUT JUST COME BACK IN TEN MINUTES.

(RECESS).

THE COURT: THE JURY IS ALL PRESENT?

THE DEPUTY CLERK: SHALL I CALL THEM AGAIN?

THE COURT: HAS ANY MEMBER OF YOUR FAMILY BEEN INVOLVED IN ANY KIND OF A LAWSUIT OR CONTROVERSY ON ANY SUBJECT? HAVE YOU PERSONALLY?

NONE HAVE.

HAVE ANY OF YOU BEEN INVOLVED IN A DISPUTE WITH YOUR EMPLOYER, OR IF YOU'RE AN EMPLOYER, WITH AN EMPLOYEE THAT YOU CONSIDER BRINGING TO OUR ATTENTION?

NOBODY HERE HAS BEEN DENIED A PROMOTION YOU FELT YOU SHOULD HAVE GOTTEN OR A JOB THAT YOU THOUGHT YOU SHOULD HAVE GOTTEN?

OKAY. DO ANY OF YOU BELIEVE THAT A BLACK PERSON IS MORE LIKELY TO BE THE VICTIM OF RACIAL DISCRIMINATION THAN PEOPLE OF OTHER RACES?

WOULD YOU COME UP TO THE BENCH PLEASE?

(BENCH CONFERENCE).

THE DEPUTY CLERK: TELL US YOUR NUMBER AGAIN.

A PROSPECTIVE JUROR: 6148.

THE COURT: YES, MA'AM.

A PROSPECTIVE JUROR: DID I MISUNDERSTAND YOUR QUESTION? DID YOU NOT SAY THAT DID I NOT THINK THAT BLACK PEOPLE WERE MORE LIKELY TO BE DISCRIMINATED AGAINST?

THE COURT: THE QUESTION WAS DO YOU THINK BLACK PEOPLE WOULD BE -- WOULD BLACK PEOPLE BE MORE LIKELY TO BE THE VICTIM OF DISCRIMINATION THAN WHITE PEOPLE.

A PROSPECTIVE JUROR: I THINK GIVEN THE HISTORY OF THIS COUNTRY, YES.

THE COURT: YOU MAY RETURN TO YOUR SEAT.

MR. QUINN: WHAT WAS YOUR NUMBER AGAIN?

THE DEPUTY CLERK: YOU SAID 6148?

A PROSPECTIVE JUROR: YES.

THE DEPUTY CLERK: THERE IS NO NUMBER HERE.

A PROSPECTIVE JUROR: I'M SORRY, 4168.

(BENCH CONFERENCE CONCLUDED).

THE COURT: WOULD ANYBODY HERE BE RELUCTANT TO DECIDE IN FAVOR OF A CORPORATION IN A DISPUTE

WITH AN INDIVIDUAL?

A PROSPECTIVE JUROR: REPEAT THAT AGAIN, PLEASE?

THE COURT: WOULD ANYBODY HERE BE RELUCTANT TO

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEBORAH QUICK SCALES, CIVIL ACTION NO. 89-796

PLAINTIFF, WASHINGTON, D.C.
APRIL 22, 1993
V. 9:30 A.M.

GEORGE WASHINGTON UNIVERSITY,

DEFENDANT.

EXCERPT

TESTIMONY OF MICHAEL TILLMAN

TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE LOUIS F. OBERDORFER
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: WENDU MEKBIB, ESQ.

FOR THE DEFENDANT: JACK M. H. FRAZIER, ESQ.

COURT REPORTER: CARRIE LUCINA GANSLE, CVR-CM
OFFICIAL COURT REPORTER
6808 U.S. DISTRICT COURT
3RD & CONSTITUTION AVE., N.W.
WASHINGTON, D.C. 20001
(202) 289-6791

PAGES 1 - 99

PROCEEDINGS REPORTED BY STENOMASK; TRANSCRIPT PRODUCED FROM DICTATION.

THE -- TO ONE OF THE MOTIONS.

THE COURT: IS THERE ANYTHING HE COULD ADD TO THE DOCUMENT?

MR. FRAZIER: HE CAN EXPLAIN THE DOCUMENT FOR THE BENEFIT OF THE COURT.

THE COURT: WELL, ISN'T THAT A MATTER OF ARGUMENT?

MR. FRAZIER: WELL, YOUR HONOR, I DON'T KNOW WHETHER MR. MEKBIB IS GOING TO CONCEDE THAT HE'S QUALIFIED AS AN EXPERT. BUT SEPARATE AND APART FROM THAT, GIVEN THE CONFUSING NATURE OF STATISTICAL EVIDENCE IN GENERAL, I DO NOT KNOW HOW UNDERSTANDING YOUR HONOR IS IN STATISTICS.

THE COURT: IT'S CONSIDERABLE. I HAVEN'T BEEN HERE FOR 15 YEARS AND IN PRACTICE FOR 45 FOR NOTHING.

MR. FRAZIER: YOUR HONOR, I'VE TAKEN STATISTICS TWICE AND I'M STILL VERY MUCH IN THE DARK.

THE COURT: WELL, I'M NOT IN THE DARK.

MR. FRAZIER: VERY WELL, YOUR HONOR. THE OTHER EXPERT, YOUR HONOR, IS LINDA CARL. SHE'S BEING PROFFERED AS AN EXPERT WITH REGARD TO NURSING, NURSING PRACTICES AND PROCEDURES, NURSING QUALIFICATIONS. SHE HAS PERFORMED NUMEROUS SITE REVIEWS OF HOSPITALS IN WHICH THAT BECOMES AN ISSUE WITH REGARD TO STAFF OF THOSE HOSPITALS FOR VARIOUS --

THE COURT: DID SHE SUBMIT AN AFFIDAVIT IN SUPPORT OF YOUR -

MR. FRAZIER: SHE HAS NOT SUBMITTED AN AFFIDAVIT.

(FROM ORIGINAL PAGE 93)

THE COURT: WHERE IS SHE GOING TO BE?

MR. FRAZIER: SHE'S GOING TO BE OUT OF TOWN, BUT I'M NOT SURE WHERE. BUT SHE'S INDICATED TO ME THAT SHE IS LEAVING WEDNESDAY THROUGH APRIL 6TH.

THE COURT: MAY 6TH.

MR. FRAZIER: MAY 6TH.

THE COURT: IS THAT WHAT YOU MEAN?

MR. FRAZIER: YES, YOUR HONOR.

THE COURT: IS THERE ANY REASON WHY, MR. MEKBIB, THAT WE COULD NOT EXAMINE HER OUT OF ORDER?

MR. MEKBIB: NO. AS A MATTER OF FACT, I WAS GOING TO SUGGEST THAT; THAT BOTH WITNESSES, IF NEED BE, BE TESTIFYING ON TUESDAY.

THE COURT: NOW, THAT WILL PERHAPS CLOUD YOUR ABILITY, THE DEPENDANT'S ABILITY TO MOVE AT THE COMPLETION OF PLAINTIFF'S CASE, BUT I THINK WE'D BETTER PUT THIS WHOLE -- PUT YOUR STORY ON THE RECORD, TOO. I PROBABLY WOULDN'T GRANT THAT MOTION ANYWAY.

MR. FRAZIER: YES, YOUR HONOR.

THE COURT: SO LET'S TAKE THOSE WITNESSES OUT OF ORDER.

MR. MEKBIB: ALL RIGHT.

THE COURT: WOULD YOU PREPARE THEM TO THE FULLEST EXTENT POSSIBLE SO THAT THEIR TESTIMONY IS IN BRIEF FORM AND IN THE CASE OF THE STATISTICIAN, FOCUSED ON THE DOCUMENTS THAT ARE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEBORAH QUICK SCALES,

PLAINTIFF,

V.

GEORGE WASHINGTON UNIVERSITY,

DEFENDANT.

DOCKET NO. CA 89-0796 LFO
WASHINGTON, D.C.
WEDNESDAY, MAY 5, 1993
9:40 A.M.

VOLUME 12
TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE LOUIS F. OBERDORFER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: WENDU MEKBIB, ESQ.

FOR THE DEFENDANT: JACK M. H. FRAZIER, ESQ.

COURT REPORTER: WILLIAM D. MC ALLISTER
OFFICIAL COURT REPORTER
ROOM 4806-B, U.S. COURTHOUSE
333 CONSTITUTION AVENUE, N.W.
WASHINGTON, D.C. 20001-2803
(202) 371-6446

PROCEEDINGS REPORTED BY STENOMASK; TRANSCRIPT PRODUCED FROM DICTATION.

PAGES 12-1 THROUGH 12-156

MR. MEKBIB: Good morning, Your Honor. At the outset, Your Honor, I would like to indicate that when Mr. Frazier brought forth his expert witnesses to testify out of turn, you inquired that the reason why those experts would not be allowed to testify out of turn is because that would disrupt the defendant's ability to bring forth its current motion, and you indicated at that time that even if such a motion is brought, you were going to deny it anyway, and predicated on that, you proceeded --

THE COURT: I said I was going to deny the motion?

MR. MEKBIB: I believe you stated that.

THE COURT: I couldn't have said that. If I did, that's impossible.

MR. MEKBIB: At least that's what I think I heard.

THE COURT: I don't remember saying anything like that, Mr. Mekbib. I'm going to decide the motion on the merits of it.

MR. MEKBIB: I'll show it to be entirely meritless.

Over the past 11 days that we have been presenting the case, the plaintiff has established three independent, separate prima facie cases. The first one of those cases, the prima facie case, is the one predicated on Davis versus Califano, cited at 613 F.2d 957, 1979. It's a decision by the United States Court of Appeals for the District of Columbia Circuit.

And I quote from page 962 of that decision. It states,

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEBORAH QUICK SCALES,

PLAINTIFF,

V.

GEORGE WASHINGTON UNIVERSITY,

DEFENDANT.

DOCKET NO. CA 89-0796 LFO
WASHINGTON, D.C.
TUESDAY, MAY 4, 1993
9:53 A.M.

EXCERPT

VOLUME 11A
TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE LOUIS F. OBERDORFER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: WENDU MEKBIB, ESQ.

FOR THE DEFENDANT: JACK M. H. FRAZIER, ESQ.

COURT REPORTER: WILLIAM D. MC ALLISTER
OFFICIAL COURT REPORTER
ROOM 4806-B, U.S. COURTHOUSE
333 CONSTITUTION AVENUE, N.W.
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PAGES 11A THROUGH 11-14

P A R T I A L P R O C E E D I N G S

MR. FRAZIER: Let me just preface my remarks. In the course of the proceedings up until now we did have testimony of several defense witnesses. Your Honor has indicated that for these purposes here we are not going to consider that testimony and I'm not going to argue based upon what Dr. Seberhagen or Ms. Carl had to say regarding what they did or regarding what Ms. McCarthy had to say, not on Mr. Mekbib's direct or my cross or his redirect. That I'll talk about, and what she said on my direct, I won't talk about. If I inadvertently say something -- you know, it's very easy for me to separate out what Dr. Seberhagen and Ms. Carl had to say, but it's not that easy for Ms. McCarthy because it is the same person.

Now, Your Honor, at this point ordinarily we would be at that stage of the trial where we would be looking at the McDonnell-Douglas test to ascertain whether the plaintiff has

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEBORAH QUICK SCALES,

Plaintiff,

v.

GEORGE WASHINGTON UNIVERSITY,

Defendant.

Civil Action No. 89-796-LFO

FILED JANUARY 25, 1991

AFFIDAVIT OF DR. JOHN W. WORK, IV

I, John W. Work, IV, PH.D., make this affidavit under the penalties of perjury and on the understanding that it is being submitted in connection with the above-captioned civil case. I also make this affidavit with the understanding that I will be called upon to testify, and am willing to testify, at the trial of the case as scheduled in March 1991.

1. Since 1979, I have served as the President and Senior Principal of John W. Work Associates, Inc., 276 Fifth Avenue, Suite 905, New York, New York, 10001. My prior work

experience and positions include the following: Vice President for Human Resources, Equitable Life Assurance Society, New York Director, Urban Center, State University of New York; Adjunct Associate Professor, at City College of New York and Bernard Baruch College; Manager, Economics Studies Unit, Dayton-Hudsons, Inc., Minneapolis, Minnesota.

2. My educational background includes a Doctor of Business Administration (with major in Management Economics), Indiana Northern University; Marshall Field Fellow, Economics, University of Chicago; Master of Science, Economics, University of Tennessee.

3. I have authored and published several books, papers and articles on a variety of subjects in labor economics, human resources management, equal employment opportunity, cultural diversity plans and programs and associated subjects. These include my books: Race, Economics, and Corporate America, Scholarly Resources, Inc., (1984); Toward

Affirmative Action and Racial/Ethnic Pluralism: How to Train in Organizations, The Belvedere Press, (1989); and The Econometrics of Racial Discrimination and Equal Employment Opportunity for Blacks: An Econometric Approach, (PH.D. thesis, May 1973).

4. My firm, John W. Work Associates, Inc., is a management consulting firm engaged in providing services in the field of human resources management with a specialized focus on minority work force dynamics [from training, to recruitment, to EEO/AA plans and programs, cultural diversity management, work force developmental integration, and an array of related subjects.] Our clients include IBM, Revlon, Equitable Life, Mutual of New York, American Red Cross, United Way of America, Camp Fire, Girl Scouts of America, et. al.

(PAGES 3 - 25 OF ORIGINAL OMITTED)

27. Our analysis and the results thereof lead to the inescapable conclusion that any requirement for a Master's degree for Nursing Unit Coordinator positions at the Department of Nursing is a requirement [a] that is not supported by job performance related criteria, and [b] that has a direct and substantial adverse impact on the opportunities of Black R/Ns to compete for these positions.

Furthermore, considering the fact that the predominant number of NUCs at the Department of Nursing have Bachelor's degrees and have performed very well, the suggestion that Ms. Scales, the plaintiff, was denied a promotion to a NUC position due to her lack of a Master's degree is merely a camouflage for her racially motivated exclusion. After all, there is no better measure of the educational qualification needed for the Nursing Unit Coordinator jobs than the Nursing Department's own performance experience with nurses of diverse educational

qualifications. That performance experience base of the Department of Nursing leaves no doubt that a Master's degree credential has no relevance to, and is not shown to contribute anything to, the ability to perform the duties and responsibilities of NUC.

IV. A COMPARATIVE ASSESSMENT OF NURSING UNIT COORDINATOR AND ASSISTANT NURSE COORDINATOR POSITIONS AT GWU HOSPITAL, DEPARTMENT OF NURSING

28. Finally, my firm was requested to compare and contrast the job duties and responsibilities of Nursing Unit Coordinator [NUC1 and Assistant Nurse Coordinator [ANC] in order to respond to the question: whether or not the plaintiff's move from the position of an ANC to that of an NUC would have entailed significant changes to constitute a promotion." Put differently, what would have been the relational changes that would have taken place had the plaintiff's position changed from ANC to NUC?

29. To address this question, we proceeded on the premise that each organization is different and would have its own unique internal organizational structure. Therefore, the starting point is the organizational chart of the Department of Nursing. We were provided a four-page document (including an organizational chart and a list of the incumbents) showing the management structure of the Department of Nursing. This document is attached hereto as Exhibit 24.

The chart leaves very little to the imagination - NUCs occupy a conspicuous and prominent position in the top management hierarchy and appear to be the critical link between the top executives of the department and the lower echelons of supervisory personnel and support staff. The Nursing Department is essentially a composite of specialized nursing units each headed by a NUC. The nursing units are not the sub-functions of the department but rather the primary functional components of the

department. Without the nursing units, there are no replacement or alternative structures one could look for. The nursing units are the Nursing Department. By contrast, the chart does not show or make any reference to ANCs. This indicates to us that, at least, from the stand point of the top management and executive structures, ANCs are unimportant and, certainly, not part of the high level management and executive positions. Therefore, the chart itself provides the first major distinction which exists between the NUC and ANC positions. In effect, it tells us that the two positions are not at comparable levels of significance and that the ANC position is outside the ambit of the top level executive and management positions in the Department of Nursing.

30. In Table 1 (Exhibit 1), the nursing management positions in the Department of Nursing are listed in their hierarchial order of significance. The NUC job is the top third position in the department, while the ANC

position is listed at number 11. In addition, the ANC position has undergone reclassification in 1988 resulting in the splitting of the job between a higher Clinical Nurse V and a lower Clinical Nurse IV positions. The Table also reflects the grade differentials between the NUC and ANC jobs. The NUC is the second top graded position in the department, while the ANC job, though not shown by grade, stands at a lower grade level. Thus, Table 1 reinforces our inference from the organizational chart that the two positions are not at comparable levels of significance and that the ANC position is outside the ambit of the top level executive and management positions in the Department of Nursing.

31. The next step in our analytical approach was a comparative examination of the job descriptions for the NUC and ANC positions. The job description for the NUC position, issued on 8/11/95, is provided here with as Exhibit 25. The job description for the ANC position, issued

on 5/16/83, is attached as Exhibit 26.

Absent weighted factors provided for analysis, our standard methodology for comparisons of job descriptions begins with an assessment of the stipulated entry-level qualifications, if any, set forth in the job descriptions. This gives us a pretty good idea as to the relative value the employer attaches to a given job in terms of what it perceives to be the minimal education, experience and other requirements needed for the given job relative to others. Noticeable differences in stipulated entry-level qualifications between jobs provides a reliable measure of the differences in levels of responsibility and significance the employer attaches to varying positions.

There are clear, distinct and substantial differences between the entry-level qualifications stipulated for the NUC and ANC positions at the Department of Nursing. Hence:

a. In terms of education, the stipulated requirement for the NUC job is "a Master's

degree in Nursing or the equivalent combination of education and experience." By contrast, the ANC job only requires "a Bachelor's degree in Nursing or an equivalent-combination of training and experience." Thus, the Department of Nursing perceives the NUC position as much higher level position relative to the ANC in terms of the educational level it expects from entry-level candidates. The two jobs are clearly distinct and different.

b. In terms of level of experience, the NUC job requires "three years of current clinical experience in the particular clinical area." By contrast, the ANC job merely requires "two years of nursing experience." Beyond the number of years of experience required, the distinction is critical in establishing the "type" of experience required. Thus, the NUC is not only required to have experience which is Current, but his/her experience is expected to be to be specific in terms of its Clinical" base and also particular in terms of the Clinical areas

itself. By contrast, the ANC job does not state any need for a specialized, specific or particular experience. Suffice it that the individual has two years Nursing experience regardless of clinical field or, indeed, outside of the clinical field.

c. In terms of supervisory experience, the NUC position requires "at least one year of supervisory experience." No actual supervisory experience is stated for the ANC job other than demonstration of Supervisory ability."

32. Another critical element of the job descriptions we examined are the definitions of "Basic Function and Responsibility" stipulated for the NUC and ANC positions. Here again, the differences are distinct, clear and substantial:

a. In terms of basic functions and responsibility, the NUC serves as the "operational head of an assigned unit, has twenty four hour responsibility for the clinical and administrative functioning of the unit area." In short, the NUC is the head of the

unit responsible for its operations and administrative functioning. This role of the NUC is consistent with what was projected in the organizational chart, i.e. the NUC occupies the top management and administrative position linking the executive group of the Nursing Department with the rest of the department's operational facets. Again, the NUC is not a sub-functional leader, but a functional authority.

b. By contrast, the ANC's basic function and responsibility is limited to "providing nursing care for individual and groups of patients and assisting the Nursing Unit Coordinator in the clinical and administrative management of the unit." It is quite apparent that the ANC is fundamentally a staff person providing individual nursing care. He/she has no operational responsibility. He/she has no administrative or management responsibility other than assisting the NUC as assigned. Therefore, we perceive no similarity whatsoever

between the NUC and the ANC in terms of their basic functions and responsibilities. The NUC is a leadership and management position, while the ANC is a staff position with the additional duty of providing assistance to the NUC. The leader and the assistant are not one and the same. They are distinct and different.

33. No less significant is the distinction between the NUC and the ANC in terms of the degree and level of supervision received. Fence the job descriptions stipulate:

a. The NUC receives direction and supervision on a "weekly or biweekly" basis from "the appropriate Associate Director of Nursing." The NUC is not subject to supervision on a day-to-day basis and her supervisory authority is the Associate Director, one of the top executives. The frequency of supervision is a measure of the significance of a position - a more spaced (such as a weekly or biweekly) supervision implies a higher level of authority and responsibility while a routine (daily)

supervision implies less authority and lesser confidence by the employer in the supervisee.

b. The ANC receives supervision "daily to weekly by Nursing Unit Coordinator or his/her designee." Further, the ANC receives "functional supervision ... daily to weekly from Nursing Educational Coordinator [NEC]." Clearly, the ANC is a much lower level position where routine (daily) supervision is envisioned. More importantly, the ANC is the subject of dual supervision both by the NUC and NEC. Therefore, our comparison boils down to an assessment of the position of a supervisory and management personnel (NUC) with the position of a supervisee (ANC). It is no small wonder that the positions we try to compare are proving to be incomparable.

34. Examination of the "Characteristic Duties and Responsibilities" of the NUC, as stated on the job description, with that of the ANC provides the final yardstick to demonstrate the differences, rather than the similarities,

in the two jobs. Numerically alone, the NUC has 20 separate and distinct characteristic duties and responsibilities as opposed to the ANC for whom 10 such characteristic duties and responsibilities are stated.

Beyond numerical differences, the NUC's duties and responsibilities envision high level management, administrative and leadership roles. These include budgetary, planning, personnel management, policy enforcement, staff supervision, staff and policy evaluation, unit-department coordination and related decision-making and other executive responsibilities. All these responsibilities are carried out at the unit level.

None of these responsibilities are, in part or in whole, uniquely associated with the ANC other than the assistance he/she is expected to provide the NUC as assigned. Even the supervisory authority the ANC is expected to provide over a limited staff is described as "functional." Again, our comparison of the two

positions merely reinforces the substantial and distinct differences which exist between the positions rather than their similarities.

35. Finally, we examined whether the University's own personnel policies could assist us in what may or may not be considered "a promotion" as perceived by the department itself. The Manual of Personnel Directives [Directive I] of the University does provide a specific definition of "promotion." Hence:

> "Promotion is the movement of an employee to a position with a higher minimum and maximum rate of pay, either within the same department or to another department."

Considering the grade differences which exist between the NUC and ANC positions (please see Table 1) and on the premise that those grade differences reflect different rates of higher minimum and maximum rates of pay, we submit that a move from the ANC to the NUC position constitutes a promotion by the University's own definition.

36. CONCLUSIONS; On the basis of the

foregoing analysis, we conclude that, had Ms. Scales been successful in her bid to become a NUC from her ANC position, she would have formed a new, clear, distinct, substantial and fundamentally different relationship with her employer. She would have been the subject of a significant promotion. We firmly reject the view that the NUC and ANC positions are similar in scope, levels, or nature of duties and responsibilities. They simply are not.

Ms. Scales was one of four ANCs on her unit providing "assistance" to her NUC as directed. The NUC was her supervisor. Bad she been promoted to the NUC job, Ms. Scales would have attained the position of her supervisor. It cannot be suggested that such a move would not have amounted to a promotion only because the NUC is expected to have the knowledge and experience base to supervise her ANCs and other staff. That would be ridiculous. In any hierarchy of positions, the incumbent in supervisory or management authority is expected

to know and be able to perform the jobs of those he/she manages or supervises. Guidance, direction and supervision are a function of such knowledge and experience.

AFFIANT'S SIGNATURE: _____ DATE: _____
JOHN W. WORK, IV, PH.D.

Subscribed and sworn before me in the State/County/City of _____ on this ___ day of _____, 1991.

NOTARY PUBLIC: _____

My Commission expires on: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA NO. 89-796

DEBORAH QUICK SCALES,

PLAINTIFF,

-VERSUS-

GEORGE WASHINGTON UNIVERSITY,

DEFENDANT

WASHINGTON, D.C.
FRIDAY, APRIL 30, 1993
9:46 a.m.

Volume 9B
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LOUIS F. OBERDORFER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: WENDU MEKBIB, ESQ.

FOR THE DEFENDANT: JACK M.H. FRAZIER, ESQ.
THOMAS D. QUINN, ESQ.

COURT REPORTER: WILLIAM D. McALLISTER
OFFICIAL COURT REPORTER
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Proceedings reported reported by stenomask, transcript produced from dictation

Pages 9B-1 through 9B-14

(FROM ORIGINAL PAGE 9B-2)

P A R T I A L P R O C E E D I N G S

THE COURT: You may inquire, Mr. Mekbib.

MR. MEKBIB: Thank you.

GINA M. BROOKS, PLAINTIFF'S WITNESS SWORN

DIRECT EXAMINATION

BY MR. MEKBIB:

Q Good morning Ms. Brooks.

A Good morning.

Q For the record, please state your full name and current occupation?

A Gina M. Brooks. I'm a registered nurse.

Q Where do you presently work?

A I work for Community Health Professionals.

Q What is your position?

A Infusion Therapist Nurse. I.V. therapy nurse.

Q Prior to your current position, was there a time when you were employed by the George Washington University?

A Yes.

Q When was that?

A As a staff nurse from April of 1985 until May of 1988.

Q Had you worked for the university prior to April, 1985?

A Yes.

Q Why don't you give us the date when you started in some capacity?

A It was back in 1981 as a nursing assistant to 1984 as a

(FROM ORIGINAL 9B-9THROUGH 9B-11)

in the interview, but there was someone else actually in the room.

Q I see. Who was that?

A That was Michael Tillman.

Q I see. When you interviewed Ms. Cooley, who were the interviewers involved?

A It was Pam Zurkowski and I think it was Vincene Walker again.

Q I see. Was Mr. Tillman there?

A I don't recall.

Q You don't recall. Now, when you interviewed -- you have no recollection of Ms. Scales' interview.

THE COURT: Asked and answered.

MR. MEKBIB: I understand.

BY MR. MEKBIB:

Q Now, during your interview of Ms. Michaels, do you recall the questions that were asked?

A Well, there weren't set questions. They were kind of -

THE COURT: The question is whether you recall?

THE WITNESS: Yes, briefly.

BY MR. MEKBIB:

Q Were there written questions that you used or that were provided?

A No.

Q Were written notes kept, do you know?

A I know I didn't take any. I didn't see anyone take any.

Q Were there any rating factors that you used to assess the candidates?

A No.

Q Were there any ranking factors that were used to assess the candiates?

A No.

MR. FRAZIER: Your Honor, could we have a little less leading. I object to these questions as being leading.

THE COURT: Well, the questions are not only leading, but she didn't make the decision. You just asked her what they did.

MR. MEKBIB: I just want to establish -

THE COURT: I know you do, but I don't want you to.

MR. MEKBIB: All right.

BY MR. MEKBIB:

Q Now, what exactly, if you recall, what were the questions that were asked of Ms. Michaels?

A One of the big questions was why did she want to leave where she was and she was at Sibley as a head nurse and come to GW if she liked what she was doing there so much?

Q And what was her answer?

THE COURT: If you recall.

THE WITNESS: I don't remember it exactly, but it wasn't anything that was like impressive to me.

THE COURT: What do you remember that it was, not what it wasn't?

THE WITNESS: It was very vague. It wasn't specific.

BY MR. MEKBIB:

Q Did Ms. Michaels, during the interview, mention anything about --

MR. FRAZIER: Your Honor, it's very clear

from the phraseology that it is going to be leading.

THE COURT: It's going to be leading. You're trying to tell her what Ms. Michael mentioned and that is by definition leading.

MR. MEKBIB: I will try to rephrase that question, Your Honor.

THE COURT: Thank you. Just ask her what Ms. Michael said.

BY MR. MEKBIB:

Q What did Ms. Michaels say?

THE COURT: That you recall.

THE WITNESS: That she had been offered the position as head nurse on 5-South.

BY MR. MEKBIB:

Q Did she say when she was offered the position?

A Before she came into the interview.

Q Did she say who offered her the position?

A Michael Tillman.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA NO. 89-796

DEBORAH QUICK SCALES,

PLAINTIFF,

-VERSUS-

GEORGE WASHINGTON UNIVERSITY,

DEFENDANT

WASHINGTON, D.C.
FRIDAY, APRIL 30, 1993
9:46 a.m.
(Partial transcript of afternoon, Day 9)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LOUIS F. OBERDORFER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: WENDU MEKBIB, ESQ.

FOR THE DEFENDANT: JACK M.H. FRAZIER, ESQ.
THOMAS D. QUINN, ESQ.

COURT REPORTER: Lorraine Strobel
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(FROM ORIGINAL PAGE 3)

P R O C E E D I N G S

MR. MEKBIB: I call Ms. Gina Brooks.

Whereupon,

GINA BROOKS

resumed the stand, and having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION

BY MR. MEKBIB:

Q This morning, Ms. Brooks you said you had had an occasion to interview Ms. Michaels for the 5-South Nursing Coordinator Position. Do you recall the specific questions that you asked her?

A In the interview I was told that I could only ask questions--

MR. FRAZIER: Objection, Your Honor. She is not answering the question that was asked.

THE COURT: Objection sustained.

BY MR. MEKBIB:

Q Do you recall the specific question that you yourself asked?

A Yes.

Q What was that?

A There was a question of Ms. Michaels on the other job, and I was told not to ask her anything-

MR. FRAZIER: Objection. Hearsay and non

(FROM ORIGINAL PAGES 8 THROUGH 10)

(BY MR. MEKBIB:)

Ms. Cooley, is that correct?

A Yes.

Q When was that?

A Sometime in March.

Q How were you recruited to interview Ms. Cooley?

MR. FRAZIER: It doesn't matter, Your Honor, It is a given.

MR. MEKBIB: Wouldn't you want to know who it was that asked her to interview Ms. Cooley?

THE COURT: What difference does it make.

MR. MEKBIB: I will cover it later.

BY MR. MEKBIB:

Q Now, during your interview of Ms. Cooley do

you recall what specific questions you asked her?

A I asked her why she wanted to come back to GW when she had previously worked there and she was doing such a good job in her current position.

Q How did you come to the conclusion--what led you to believe she was doing a good job at her previous job?

A Just for her talking about it. I mean, I am not sure. I mean, she liked her job basically is what she said, she liked it here, but you know.

Q Where did she work, do you recall?

A She worked in the Accident Rehabilitation Hospital.

q Did she say that in her interview?

A I don't recall her stating it or whether the information was given to me in her resume.

Q All right. What questions were asked of her during the interview?

A Why she wanted to come back to GW.

Q What was her response?

A Well, it was pretty vague for someone I thought that worked here.

THE COURT: She gave a vague response?

THE WITNESS: I was looking for something more specific.

THE COURT: Your answer is she gave a vague response?

THE WITNESS: Right.

BY MR. MEKBIB:

Q What was your assessment of Ms. Cooley as the NUC?

A In the interview and the conversation I had with my colleagues I felt she was not a candidate for 5-South given the fact that she had interpersonal communication problems while she was working at GW before with my colleagues and myself.

Q Now, at the time when you interviewed MS. Cooley were you aware that there was any other candidate for the position?

MR. FRAZIER: Objection, Your Honor. That is very much misleading.

THE COURT: All right.

BY MR. MEKBIB:

Q At the time that you interviewed Ms. Cooley who else did you compare her with?

THE COURT: If anyone?

BY MR. MEKBIB:

Q If anyone.

A No one.

Q And, why was that7

A I didn't know anyone else was a candidate for 5=South.

Q You did not know?

THE COURT: She has answered the question.

MR. MEKBIB: All right.

BY MR. MEKBIB:

Q Do you recall giving your assessment of Ms. Cooley to anybody?

A Yes.

Q Who was that7

A Michael Tillman.

Q What did you tell him?

A I told him she was not the right candidate for the 5-South job, given the fact that she had worked here

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOCKET NO. CA 89-0796 LFO

DEBORAH QUICK SCALES,

PLAINTIFF,

-VERSUS-

GEORGE WASHINGTON UNIVERSITY,

DEFENDANT

WASHINGTON, D.C.
MONDAY, APRIL 26, 1993
9:42 A. M., MORNING SESSION

VOLUME 5
TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE LOUIS F. OBERDORFER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: WENDU MEKBIB, ESQ.

FOR THE DEFENDANT: JACK M.H. FRAZIER, ESQ.
THOMAS D. QUINN, ESQ.

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PROCEEDINGS REPORTED BY STENOMASK, TRANSCRIPT PRODUCED FROM DICTATION

PAGES 5-1 THROUGH 5-78

(FROM ORIGINAL PAGE 5-15 THROUGH 5-18)

DIRECT EXAMINATION (continued)

BY MR. FRAZIER:

Q Now, I am going to hand you what has already been admitted into evidence as Plaintiff Exhibit 163-A, B. C, D, E, F. G. H. T and U.

THE COURT: Are those all in evidence?

MR. FRAZIER: I believe these are all in evidence.

THE CLERK: 163-A, B. C, D, E, F. G. H. I. T and U are in evidence

THE COURT: Is that all?

MR. FRAZIER: Yes, Your Honor.

BY MR. FRAZIER:

Q Now, before we start on the particular exhibits, what documents did you review in consideration of the validity of these particular exhibits in this case?

A I read Dr. Work's deposition from May of 1990 and I also read his affidavit from January of 1991.

Q And did you also review all of the

exhibits that were attached to those two documents?

A Yes.

Q Now, with regard to these various exhibits, starting with A through F. do the charts that are provided in these exhibits provide an accurate description of George Washington University Hospital's nursing work force?

A No, I don't believe it does.

Q In what way do these exhibits fail to accurately describe the university's nursing work force?

A Well, I believe that the description that these exhibits provide is not accurate because Dr. Work aggregated all the data for people who worked in these nursing jobs from January 1st of 1981 until August 3rd of 1989, such that every employee in a job counts as one, one person, one employee regardless of whether that employee worked in that job for one day or for eight years. So that if a person

worked in a job title for one day, that counts as one in his statistical analysis. If an employee works at that job for eight years, the entire period being studied, that person counts as one unit.

So, I think that distorts the impression or the picture of the nursing work force.

Q And would the fact that an individual who is promoted during that time frame is counted more than once in this analysis, would that be a further distortion of the work force?

A Yes, it would.

Q Now, in looking through these exhibits, there's an indication that there is an over representation by whites and an under representation by blacks in the university's work force. As a result of your experience, and having reviewed these various documents and evidence upon which Dr. Work based his analysis, what validity does the assertion from these documents that there's an under utilization of blacks in the GW work force

have?

A Well, I believe that Dr. Work's analysis is incorrect, that It does not show under utilization.

Q And why does it not show under utilization?

A First of all. his Exhibit 163-I is the end result of his analysis where he does a statistical analysis of the number of white employees versus the number of black employees and this analysis, first of all, does not follow the procedures for investigating adverse impact that are described in the uniform guidelines on employee selection procedures which is the primary federal policy on determining adverse impact.

Q Is that the eight-factor analysis by Dr. Work?

MR. MEKBIB: Objection.

THE WITNESS: No.

BY MR. FRAZIER:

Q Is that 163-I?

A Maybe I'm misreading it. It's Table 5. It's either an "I" or a "T" or maybe an "L."

THE REPORTER: Would you clarify that for the record, please.

BY MR. FRAZIER:

Q This is Table 5, plaintiff's Exhibit 163-I?

A Yes.

Q Now, looking at Exhibit 163-I, what is it that this analysis purports to do?

A Well, what it does, it shows the number of white employees and the number of black employees, and then Dr. Work applied a statistical test to see if the number of black employees was significantly less than the number of white employees. The arithmetic is correct, that there is a significant difference in the number of black employees and the number of white employees.

However, that is not the relevant comparison for determining adverse impact. The

relevant comparison would be the number of -

THE COURT: We are not talking about adverse impact.

MR. FRAZIER: Beg your pardon, Your Honor.

THE COURT: We're not talking about adverse impact.

MR. FRAZIER: Your Honor, with regard to Table 5, Dr. Work testified, indicating that this chart indicated that there was under utilization of -

THE COURT: That isn't what he said. That wasn't what your witness said. He's not talking about adverse impact.

MR. FRAZIER: Yes, Your Honor.

THE COURT: Well, adverse impact of what? We don't get to adverse impact. I thought we were talking about under utilization.

MR. FRAZIER: Yes, Your Honor.

THE COURT: Is that the same thing?

MR. FRAZIER: No, Your Honor, not necessarily.

THE COURT: He said one thing, you've said another.

(FROM ORIGINAL PAGE 5-20)

BY MR. FRAZIER:

Q And is that problem present in all entries of Table 5?

A Yes, it is.

Q Turning to Plaintiff's Exhibit 163-T and 163-U, Tables 18 and 19, have you had an opportunity to review these exhibits?

A Yes, I have.

Q. Now, do these exhibits indicate to you that there is a problem with the university showing any kind of preference for a Masters of Science in Nursing when making job selections?

A The exhibits provided by Dr. Work are intended to show the relationship between education and the overall performance rating, and Dr. Work concluded that there was no relationship between education and the overall performance rating; therefore, it was not a

valid requirement. And I believe Dr. Works analysis was flawed in that this analysis does not prove anything one way or the other.

Q What are the problems with regard to the analysis provided in Exhibits 163-T and 163-U that lead you to the conclusion that they do not demonstrate what Dr. Work ha asserted?

A Well, first of all, there's a problem with the sample of data that's included here that provides the whole basis for the analysis. The sample or the analysis was not based on the representative sample of data.

The analysis was based on 42 cases between January of 1981 and August of 1989 in which both the education and the rating data were available for current employees. Thus, there's not necessarily a random sample of data, but merely an available sample, which could be distorted.

My analysis of the same data base found that there were 31 Nursing Unit Coordinator positions that were filled wither by black or

white employees. Thus, over a nine-year period from 1981 to 1989, one would expect to have a total of 279 ratings to be made for these employees.

Q Now, with regard to the analysis provided here in Tables 18 and 19, Dr. Work does not include a total breakdown for all of the individuals selected and ratings for each particular year, is that correct?

A That's correct.

Q. So, it's not possible for you to go through and ascertain to what extent the samples are representative of the entire class, is that correct?

A That's right.

Q Now, what problem does the limitation of the sample size cause with regard to the overall analysis?

A Well, in addition to the fact that it's not a representative sample, the size of the sample is very small. There's only 42 cases, and for this particular type of validation

method which is called a criterion-related validation method, the rule of thumb in the profession is, you need to have a sample of at least 200 cases in order to get reliable findings in this type of analysis, and Dr. Work had only 42 cases which is much less than the 200 that is normally needed to provide a reliable and meaningful analysis.

Q Now, giving that it's a relatively small number of cases, can the ultimate outcome of the analysis be affected by the fact that there are a number of different people doing the analysis of each of the different Nursing Unit Coordinators over that nine year period of time?

A Yes. That has to do with the reliability and the validity of the performance ratings themselves; and when you do a criterion related validation study, you'd have to justify your criterion measure or your work performance measure as part of the study and Dr. Work has no evidence that these ratings

were reliable and valid.

Q Now, apart form the mathematical correctness of the operations that Dr. Work performed on the data, what is your conclusion regarding whether or not these tables indicate an inadequate correlation between education and performance at GW?

A Well, I have some additional criticisms of the analysis. First of all, Dr. Work's analysis is based on the computer records of the University's personnel data, and these records probably did not reflect the current educational attainment of the people being rated due to the lag time which naturally occurs between the completion of course work and the updating of the computer information system.

And also, the way education is defined as a variable is defined in the terms of whole degree requirements, for example, an associates degree, a bachelors degree or a masters degree. It doesn't indicate partial

attainment of these degrees which I understand the university people are often taking courses while they're working so that people may have completed 50 percent of the degree requirements for the next level or 90 percent of the degree requirements and so forth, and yet they would only be given credit for their last full degree that they had received, so the measure of education here is a very imprecise and inaccurate measure of education.

Then another concern I have is that Dr. Work assumes these performance rates are the only legitimate measure of job performance or other business objectives of the university.

Dr. Work does not show that education is an invalid predictor for predicting other legitimate measures of job performance or other business objective of the university, so this overall performance rating is not the only possible criterion measure that one might use to evaluate the validity of educational attainment. Then, finally, Dr. Work's

analysis did not control for any other variables besides education that would be likely to affect the overall work performance, such as work experience, attendance and the particular work unit that somebody was working at. Each different work unit might have somewhat different standards and different requirements for that particular position and so somebody might be working fully up to standards in one work unit but they would not be able to work up to standards in a different work unit.

So, none of that was controlled for and so I feel that this is a totally inadequate criterion related validation study and it doesn't prove anything.

MR. FRAZIER: Your Honor, I do not have any more questions for this witness with regard to these exhibits.

THE COURT: Why don't we let cross-examination on those go forward and then we'll go on to the next phase.

MR. FRAZIER: Yes, Your Honor.

THE COURT: Do you need any time to organize your thoughts, Mr. Mekbib?

MR. MEKBIB: I could probably give it a try, Your Honor.

CROSS-EXAMINATION.

BY MR. MEKBIB:

Q You had indicated that Tables 1 through 5 marked as Plaintiff's Exhibit 163-A through I that were prepared by Dr. Work are inaccurate. I'd like to share with you, look at Table 1, please, sir. In fact, look at Table 1-A to be more precise.

A (Perusing document.)

Q I'd like to share with you what is marked as Plaintiff's Exhibit 37-B. That exhibit is the list of associate directors that the university had listed and provided to plaintiff. I'd like you to look at the column there on the first side. Employee social security number, name, sex, ethnic group. Now, who, on this list, as you go through this five

pages, could you possibly say has been under counted, inaccurately represented in that count of associate directors of nursing that is clearly identified by number on that table?

A If I may clarify one point?

Q Could you answer my question?

A If you'll give me a few minutes, I'll go through the exhibit you just handed me.

(Perusing document.) When I referred to inaccuracies, I'm referring to an inaccurate picture of the university's work force and there are several kinds of inaccuracies. The raw data I found that about 50 percent of the records contained errors in dates or they were lacking dates.

Q Let me stop you, Dr. Seberhagen. I'd like to be specific here. I don't really appreciate generalizations. Now, here is information provided by the university. Do you have any basis to maintain that this list you have in front of you was not the list of associate directors who had encumbrance in their

positions between 1981 to August, 1989, do you have any reason to maintain otherwise?

A No. The names of the people I accept as being accurate and the number of people. What I'm referring to are the dates -

Q Let me take you step by step. You consider the social security numbers to be accurate?

A I accepted them as accurate. I had no way to check them independently.

Q Do you accept the names to be accurate?

A Yes, I do.

Q Do you accept the gender to be accurate?

A Yes.

Q Do you accept the ethnic group to be accurate?

A Yes.

Q Do you accept the title designation, position designation to be accurate?

A Yes.

Q Now, if you accept those five criterion that are listed, wouldn't it be a matter of

simple count to see how many Associate Directors of Nursing there were, what the races were, how many of them were black, how many of them were white?

A I don't agree that that provides an accurate picture of the labor force. It would be better to look at the number of person days that each group worked during this period where you have, in Dr. Work's totals, one person on this list, you have 22 names here and each of those counts as one, so we have a total of 22 total employees; and within that total of 22, and I haven't looked at this in detail, but it's possible that one of those 22 worked for one day and another person on the list of 22 worked for eight years and those two are given equal weight in the analysis, and I think that gives a distorted picture of the true work force.

Q That is your theory?

A Yes.

Q Let us test your theory against this

table that you have before you. Indicate to me one single person who you maintain has worked for one day.

A I'm saying it was possible.

Q You have the table there, the date of hire and the date of termination. If you don't see a date of termination, the employee had continued to work there. Based on what you see here, please provide any individual that you regard had a tenure of one day, one week, one month or even one year?

MR. FRAZIER: I have an objection, Your Honor. The objection, Your Honor, is that Mr. Mekbib is not allowing the witness to finish his answer. If he doesn't like the answers, - he's interrupting him.

THE COURT: He's marking him answer the question he asked. If you want to expand on the question he asks, you have an opportunity to do that on redirect examination.

MR. FRAZIER: Yes, Your Honor.

THE WITNESS: (Perusing document.)

BY MR. MEKBIB:

Q Please continue.

A If you look at one of the last items on the list, Patrick Barbati?

Q Who?

A Patrick Barbati, on the last page of the list, date hired, 1968, date terminated 1981, 04/30, so June 30th of 1981, this individual was terminated --

Q How?

A Excuse me?

Q Continue, please.

A So, this person, during the period of analysis, which was from January 1st of 1981 until August 3rd of 1989, this person worked approximately six months and this person, Mr. Barbati, counts as one in the analysis, one out of the 22.

Now, we look at another employee, let's look at Louis Perchure (phonetic), who is on the third page of the exhibit. I'm picking them here as soon as I see one. Louis

Perchure was hired 1971. She was not terminated. So, presumable she worked the entire nine-year period in this particular job classification. So, she counts as one of the 22. So, she has equal weight to the person who only worked six months and I find that unappealing. That does not give me an accurate description of the people in the work force.

If we had the number of person days or person years that each group, whites or blacks, worked in this particular job or if we had a picture at one point in time, then that would give us, I think, a more accurate description of the percentages of employees in the university's work force.

Q Let's turn to that last name on the third page, Patrick Barbati. When that individual left in June, 1981, is it fair to assume that he was replaced by another associate director?

A We don't know. All we have here are 22 names here.

Q Is it fair to assume that Barbati had been replaced by another associate director, or is it your understanding that the university has 20 plus associate directors, all in service, all at one time?

A Well, it's my opinion, my own independent analysis showed that there are not 22 positions all at one time. But whether this particular position was filled or whether it was abolished, I don't know, and nobody has any basis for saying from this exhibit.

Q If you go through this chart, you notice dates of recruitment, sir, which is also the date of hire, you go through those and indicate to me the ones that were hired as Associate Directors of Nursing since 1981 and identify those who are black and those who are white?

MR. FRAZIER: Your Honor, I object to the question because it misstates the meaning of the exhibit, and if we may approach, I'd like to explain further to Your Honor.

THE COURT: Why don't you come to the bench and have the witness step down?

(Bench conference on the record.)

(FROM ORIGINAL PAGE 40 ET. SEQ.)

basis of his criticism of Dr. Work's analysis was, Your Honor, and I think I ought to find that out, so I can formulate questions as to what he did not know regarding Dr. Works' information base.

THE COURT: If you're going to run every rabbit that is in this -

MR. MEKBIB: I'll move on to a different question.

BY MR. MEKBIB:

Q You have also indicated during your testimony that the data Dr. Work used to conduct this analysis on 42 employees is inadequate to reach conclusions as he has done.

THE COURT: He said that an adequate statistical base would require 200 cases and this is 42. That's the nub of this. Do you

want to ask him about that?

MR. MEKBIB: Yes.

THE COURT: What is your question?

BY MR. MEKBIB:

Q What theory of statistics would allow you to perform a study on 42 out of 60 employees in what department and reach a conclusion as to performance evaluations? Is there any theory that would allow you to do that in statistics?

A Well, there may be a proper analysis for that small of a group. But this particular method that Dr. Work used is what I'm criticizing and that he only had 42 cases and that normally you need to have 200 cases for this type of analysis. And most people, if they have less than 200 cases, they don't even try to do this analysis because it gives misleading results.

Q What if your total is 60 and you have 42 cases, could you perform a statistical analysis?

A If you have less than 200 cases, you do

not have enough. In any kind of research that a person does, you can't just use any method that you want to use. You have to meet the basic criteria for using a particular method, and the standards for using this particular method called for having 200 cases. If you don't have 200 cases, you have to use something else.

Q Let me get this far. Look at who are nursing unit coordinators. You classify them by their educational credentials. You look at their performance evaluations and is it your testimony that with that information you cannot make conclusions as to the importance, the value of their educational credentials to performance? Is that your testimony?

THE COURT: He says you can't verify it the statistical analysis. There may be other ways to do it, but you can't just do it by statistics. That's his opinion. Now, you come in here with another opinion, that's fine, but that's his opinion. Now, why do we

need to chew on it?

BY MR. MEKBIB:

Q If you turn to Appendix 1 to Table 18 which is Exhibit Number 163-T. You look at the average overall performance rating for each individual under their respective degrees and then the "Y" value and "X" value are indicated there, what is wrong with that approach?

A You said something that caught my attention that these were average performance ratings. Let me just clarify something. My assumption here was that these are average ratings, that there may been several rating individuals, that these are ratings from one person and a one-year period of time.

What's wrong with that is you have too small of a sample size here to draw any conclusions, and it's not necessarily a representative sample either. It may be as little as 15 percent of the total number of ratings that potentially could have been available.

So, it's a very small sample from the total possible and it's just whatever data was available in the files, and there may have been -- that data is not necessarily a random sample of all of the possible data.

There may have been systematic reasons why data was not in the file that affect the relationship between education and work performance.

So, these numbers are not a good sample to start with. If you have a faulty sample, any numbers that you draw out of that sample are going to be inconclusive.

BY MR. MEKBIB:

Q Let's look at one of them, master's degree 1.75. That is one individual. It's the average overall performance rating.

THE COURT: Where are you, sir?

MR. MEKBIB: On the appendix to Table 18.

THE COURT: Where in the appendix?

MR. MEKBIB: Just one of the numbers, 1.75 master's degree. That's one individual.

THE COURT: Where is that on Appendix E?

MR. MEKBIB: Appendix to Table 18.

THE COURT: I know but where is 1.75?

MR. MEKBIB: That would be Exhibit 163-T.

THE COURT: You're taking about this table?

MR. MEKBIB: No, 163 T, Your Honor.

THE COURT: 163-T.

BY MR. MEKBIB:

Q Dr. Seberhagen, do you know how many performance evaluations of that individual were used to compute that 1.75 figure?

A No, I don't. Dr. Work didn't say.

Q Do you know whether that evaluation was for four years, three years, five years, eight years of that's individuals performance as Nursing Unit Coordinator?

MR. FRAZIER: Objection, Your Honor. He has already said he does know Dr. Work didn't say.

THE COURT: Let him say it again.

BY MR. MEKBIB:

Q Can you look at this data here and state to the court, if you will, how many actual performance evaluations were used to perform this analysis? Yes or no?

A I can't say for sure. I assumed that it was one year's rating period.

Q Well, your assumption is wrong.

MR. MEKBIB: I have no further questions.

REDIRECT EXAMINATION

BY MR. FRAZIER:

Q With regard to Tables 18 and 19, given that this data is drawn from the period of 1981 to 1989, given further that there are multiple years for at least some of these individuals, although not necessarily from the same year, that is, that some of the data from some of these individuals may come from 1981, that other individuals may not have held the positions in question in 1981, and thus the information that they're being compared with comes from other years like 1986 or 1987 or 1988, does this cause further problem with

regard to the validity of this study?

A Yes, it does. I was assuming one year because that would be to the benefit to Dr. Work. That's the way that somebody would normally present this data.

If one of these numbers represents several years worth of ratings, then this entire analysis is completely wrong because the basis of the analysis is the variation in the ratings. And if somebody works for eight years and had an average rating of two for all of those eight years and gets just one listing on here, that's one case. And if someone else worked for six months and got a performance of one, and that counts as one case, then it's totally misleading on the amount of variability in these numbers.

If the person who had been there for eight years and had eight ratings should count eight times more than the person who was only rated one year, because that affects the overall variability of the ratings for each

level of education, then this analysis is even worse than what I thought when I began. I had given Dr. Work the benefit of the doubt that these were one-year internals, but not it's even less informative than I originally thought.

Q Now, given that this is going over multiple years, at least for some of these individuals, then would there be further error introduced if you had an individual who was included over an eight-year period and that during the course of that eight-year period, that person advanced from having actually received an associates degree to bachelor's degree to master's degree or having actually received a bachelor's degree to master's degree, but having all of his data in one column as having attained either the ultimate degree of master's degree or the earlier degree of bachelor's degree with no attempt to control for what level of educational attainment that person had at the time the

rating was given for each rating?

A If that occurred, that would be another very bad error in the analysis. If somebody is listed as having a master's degree, that should only cover all ratings after the person has received the master's degree. It should not include any ratings that person has gotten when they only had a bachelor's degree, for that would completely distort the meaningfulness of the numbers. It wouldn't make any sense to do that.

Q Given that some of these figures are for multiple year periods, would it then not even be more important to attempt to control for the experience level year by year that the person has attained over the course of the years that that person may have been a Nursing Unit Coordinator?

A Yes. There are various other variables besides education that would affect somebody's work performance, so you'd want to control for those other variables to the extent that you

can to isolate just the affect of education. We're not confounding that with may other variables.

MR. FRAZIER: I have no further redirect on these charts, Your Honor.

THE COURT: Recross?

RECROSS EXAMINATION

BY MR. MEKBIB:

Q I'm still trying to understand exactly what it is you're trying to imply was wrong with Dr. Work's analysis in Tables 18 and 19. Now, the charts, the tables clearly indicate that the purpose of the analysis is to measure performance against educational credentials. The conclusion is that the level of educational credential, particularly at the master's and bachelor's level, is statistically insignificant. That conclusion, if so, in fact, leads to the presumption that experience more so than education is the higher variable.

THE COURT: He didn't say that. That's

an argument you can make, Mr. Mekbib, but this witness has not said that.

BY MR. MEKBIB:

Q This data that you have there Dr. Seberhagen, does it say anything about experience?

A No, it doesn't.

Q By identifying one particular criterion, education as a measure of performance, has it, in fact, excluded other possible factors that explain performance?

THE COURT: Isn't that obvious? I mean, why do you have to ask him that? There it is, it says, "education" that's all it is.

MR. MEKBIB: I have no further questions, your Honor.

THE COURT: Thank you.

MR. FRAZIER: May I proceed to the next chart?

THE COURT: I think we should give Dr. Seberhagen a break and step out while we concoct the next brew for you.

Once again, there is no under utilization.

And that is the relevance of this witness' testimony.

THE COURT: That's what the purpose is, that's what the proffer is.

MR. FRAZIER: That what the proffer is.

THE COURT: Mr. Mekbib, you don't understand the relevance of that?

MR. MEKBIB: Your Honor, I have time and again tried to understand what it is that we have as issues and what it is we have not. It was my clear understanding that the utilization analysis of Dr. Work had been withdrawn to facilitate this proceeding to go forward. Now, Mr. Frazier is injecting into this whole process yet an additional set of testimony regarding utilization analysis. I have no objection to this testimony going in so long as I have the right to bring back Dr. Work to testify to his utilization analysis. If that's the way we're proceeding, let me at

least have that opportunity. I'll bring back Dr. Work to testify to this matter. That's all I ask, that I should be given a chance. I had thought that this was all irrelevant.

THE COURT: Did we strike the utilization testimony of Dr. Work?

MR. MEKBIB: Yes, Your Honor, we did precisely that.

THE COURT: Is that what we struck?

(FROM ORIGINAL PAGE 5-58)

LANCE W. SEBERHAGEN, DEFENDANT'S WITNESS (resumed)

DIRECT EXAMINATION (continued)

BY MR. FRAZIER:

Q Dr. Seberhagen, I'm going to hand to you what has been marked as Exhibits 3-A through 3-R and we'll go through them one at a time. Dr. Seberhagen, did you perform an analysis of your own regarding the George Washington University work force for nursing jobs?

A Yes, I did.

Q And how did you go about doing that?

A Well, first, I took all of the raw data that Dr. Work used which he received from the university. I took all of that raw data and put it my computer, listing all of the employees who had worked in nursing jobs from January 1st of 1981 through August 3rd of 1989. Once I had all of the data entered into the computer, I sorted the data by the date that the person worked in each particular job to show the university employees at one point in time. I computed the employment for two different dates, July 1st of 1986 and July 1st of 1987, to define the beginning of the time period in which Ms. Scales was rejected for promotion to Nursing Unit Coordinator. She was rejected for promotion in approximately January and March of 1987, so I picked a point, roughly six months before and several months after the final selection decision to bracket the time period.

Then I computed the percentage of black and white employees by job classification or

job title for each point in time, that is, for the July 1st of '86 and July 1st of '87, to provide two dates in time of all of the employees who worked at the university on that particular date.

Q Now, with regard to Defendant's Exhibit 3-A, this is a compilation of the data for 1981 through 1989?

A Yes, it is.

Q And this is for all of the nursing personnel in management positions?

A Yes, it is. This is the table that I produced based on the

(FROM ORIGINAL PAGE 5-64 ET. SEQ.)

THE COURT: It would not be a significant indication of anything but chance if there were no blacks in that category or if there were six blacks in that category?

THE WITNESS: That's right.

THE COURT: If there were seven blacks in that category that would be significant, you would look to some other reasons than chance?

THE WITNESS: That's right, random probability.

THE COURT: That's your theory?

THE WITNESS: Yes.

BY MR. FRAZIER:

Q Now, with regard to that zero to 25 percent confidence interval, that's based on the size of the sample, isn't it?

A Yes.

Q So, you have zero to 25 percent on line 6, with a total number of 25 in that category, but the range for clinical nurse four is 8.6 percent to 16.3 percent with a total number of individuals of 296.

THE COURT: Where are you?

MR. FRAZIER: That's on line 4 of the same page.

THE COURT: All right. Go ahead.

THE WITNESS: That's right. It's a narrower confidence interval because you have a larger sample size which produces more reliable or more precise percentages.

THE COURT: Let me ask you this, if you will excuse me, Mr. Frazier. Does your magic number of 200 apply to this sample, too? Is this statistically useful for those categories that are less than 200?

THE WITNESS: No. The 200 sample size does not apply to this particular analysis.

THE COURT: Why not?

THE WITNESS: When you get a very small sample size, the percentage, the confidence interval will expand to be very broad.

THE COURT: You are saying that you compensated for the lack of a proper sample size by increasing the range within which chance could throw the result?

THE WITNESS: Yes. But even so that -

THE WITNESS: That wasn't cured in the other thing in which you found the -

THE WITNESS: It wasn't cured. There were a variety of reasons in the other analysis.

THE COURT: I have a particular concern about the flat statement that 200 is a magic

number and anything below that would render the statistical analysis meaningless. You are telling me now that it could be made meaningful by expanding the variable within which the law of probability would throw the result, the range which the law of probability could throw the result.

THE WITNESS: Well, here, I was just looking for a pure statistical significance. In the other analysis we were looking for a meaningful relationship between education and ratings of job performance.

THE COURT: It was offered only as a statistical analysis.

THE WITNESS: It was. But by having such a small sample size you would need to get an extremely large statistical relationship between -

THE COURT: It can't get much smaller than two.

THE WITNESS: I was talking about the other analysis of 42.

THE COURT: Why can two have some significance here and I guess when you put the range zero to 100, it doesn't have any.

THE WITNESS: Well, that's true, and essentially these numbers are so small that you cannot really conclude that there is a significant relationship.

THE COURT: Is there any place where an entry level reader could reconstruct your theory about the 200? Is there a source for that?

THE WITNESS: Your Honor, journal articles. The Journal of Applied Psychology had an article in 1978 which I'd be happy to provide to the court.

THE COURT: You probably should give that to counsel and see if it can be provided.

THE WITNESS: It has to do with the power of detecting a significant relationship and the standard would be so high with the sample size of 42 that there could be a truly meaningful relationship between those

variables. But you would not have a large enough size to detect it.

THE COURT: You are not saying anything why that same thing doesn't apply in spades to a sample of two, and you answer that by, in effect, indicating by the zero to 100 that there is no statistical meaning. If it can fall within zero to 100~ then it is zero. It's a zip.

THE WITNESS: If the sample you are dealing with is very small, there are very few conclusions you can draw from that. And what I'm showing here is that you cannot make a firm conclusion of under representation from such a small sample. Just as you could not show that there was no relationship between the education and performance ratings with such a small sample.

THE COURT: Okay.

THE WITNESS: You need to have a large sample.

THE COURT: You put that article in and we can go on. Do you have anything more that you want to explain out of this? I mean, I get the message.

BY MR. FRAZIER:

Q With regard to Exhibits 3-E and 3-F for the position of Nursing Unit Coordinator, what were the percentages of black

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA NO. 89-796

DEBORAH QUICK SCALES,

PLAINTIFF,

-VERSUS-

GEORGE WASHINGTON UNIVERSITY,

DEFENDANT

WASHINGTON, D.C.
MONDAY, APRIL 26, 1993
1:56 P. M.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LOUIS F. OBERDORFER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: WENDU MEKBIB, ESQ.

FOR THE DEFENDANT: JACK M.H. FRAZIER, ESQ.
THOMAS D. QUINN, ESQ.

COURT REPORTER: GWENN A. SCHLEMMER
MILLER REPORTING CO., INC.
507 C STREET, N.E.
WASHINGTON, D.C. 20002
(202) 546-6666

(FROM ORIGINAL PAGE 3)

P R O C E E D I N G S

THE COURT: Are there any preliminary matters?

MR. MEKBIB: No.

MR. FRAZIER: I just want one or two items from the Witness with regard to this last exhibit.

Whereupon,

LANCE W. SERERHAGEN. Ph.D.

resumed the stand and, having been previously duly sworn, was examined and testified further as follows:

FURTHER DIRECT EXAMINATION

BY MR. FRAZIER:

Q If you could take a moment and look over Defendant's Exhibit 3-R.

A Yes, I have.

Q What is the interaction that Exhibit 3-R has, for the information and instructions for completing an application, to practice registered nursing and advanced registered

nursing in the District of Columbia, to your analysis, regarding this matter?

MR. MEKBIB: Objection.

THE COURT: What is the objection?

MR. MEKBIB: [No response.]

THE COURT: Did he have an objection?

MR. FRAZIER: Yes, Your Honor. I don't know what the basis is.

(FROM ORIGINAL PAGE 5)

There is nothing in this document that says that, once you get a license, you have to continue living in the District. It also says that someone coming from outside of the District can work under the supervision of someone who is licensed in the District while their application is pending with the D.C. Licensing Board for registered nurses. So based on that I concluded that the relevant labor area did not have to be limited just to the District of Columbia; that, as far as the licensing requirement, there was no barrier to the university to hire from the three-state

area or nationwide, if it wanted to.

Q And Exhibit 3-R provides the -

THE COURT: That is what he said.

MR. FRAZIER: Well, I just wanted to ask if this is the entire application package that he received from the Government of the District of Columbia.

THE WITNESS: Yes, this is the entire package that I received.

MR. FRAZIER: I have no further questions for this witness.

THE COURT: Cross-examination?

CROSS EXAMINATION

BY MR. MEKBIB:

Q Good afternoon Dr. Seberhagen. I would like to refer your attention to Defendant's Exhibit 3-A, 3-B, and 3C. If you would, please, turn to page 16 of Exhibit 3-A, at No. 437, on page 16, the list of Nursing Unit Coordinators for the period from January 1, 1981, through August 3, 1989, begins.

If you go down that list, at No. 440, you

see Marilyn Archie as a black nursing unit coordinator;

At No. 449, you see Ms. Cooper as the second black nursing unit coordinator;

At No. 459, you see M.J. Floyd as the third black nursing unit coordinator;

At No. 464, I believe it is, you see Edna Hamilton as the fourth black nursing unit coordinator;

At No. 480, you see Sandra Madison as the fifth black nursing unit coordinator; and

On page 70, you find at No. 547, the sixth and final black nursing coordinator out of the 73 total that you have listed for that entire period.

Now, if you would please turn to Exhibit 3-B, the list of nursing coordinators that you have for 1986. It starts at page 21, at No. 223.

THE COURT: No. 223.

MR. MEKBIB: At No. 223, page 21.

BY MR. MEKBIB:

Q These are the ones you listed as nursing unit coordinators for 1986. The name Marilyn Archie is also shown here as the black nursing unit coordinator. Floyd, Meyer, is also shown as the black nursing unit coordinator. Indeed, the same identical five nursing unit coordinators, except for Edna Hamilton is shown in 1986 as it had been shown for the entire data from 1981 through 1989. You find that same five names of black nursing unit coordinators contained and reflected in your 1987 data.

From that consistency of the same five nursing unit coordinators being the primary course of black representation in that group over that entire period of time, could you state to the Court why it is that you regard the testimony of Dr. Work or his study, his analysis, that indicates the total representation of blacks as limited to five or six to be erroneous?

A It wasn't the number. It was the percentage.

THE COURT: Answer that question, Doctor. Was that counting erroneous? Just the counting; that is all he asked.

THE WITNESS: I will check another table. Well, I thought it is erroneous because five is different from six. So it gives a different picture, if you look at one point in time versus if you look at the whole eight-year period.

BY MR. MEKBIB:

Q Do you know whether the list that the plaintiff was provided contained 73 nursing unit coordinators?

A I don't know the number cff the top of my head. If you can refer me, please.

Q I can refer you to Plaintiff's Exhibit No. 37-A.

THE COURT: What difference does it make whether he knows it or not?

MR. MEKBIB: I will skip that question.

BY MR. MEKBIB

Q From what you have seen in Exhibits 3-A through 3-C, does that indicate to you, sir, that the mobility of white nurses, the change of jobs by white nurses, takes place at the higher pace than it does for black nurses?

A If you predicate that question just on the number of black nurses and now you ask me-

THE COURT: Excuse me, Doctor, but listen to the question. The question was whether these exhibits reflect the difference in pay between white and black nurses -- these three exhibits -- that is all he is talking about.

THE WITNESS: The difference in pay; no.

BY MR. MEKBIB:

Q Mobility.

A They can show differences in mobility; yes.

Q That white nurses end up in nursing unit coordinator positions, which they leave at a faster pace than black nurses do.

A That's right.

(FROM ORIGINAL PAGES 18-19)

RECROSS EXAMINATION

BY MR MEKBIB:

Q Dr. Seberhagen, when the number is small, like, 22 assistant associate directors of nursing, what is the purpose of having a statistical analysis of that? If you look at the 22, and say 20 of them are white, 2 of them are black. Isn't there a point of time when numbers in the raw data -- the raw data itself -- becomes the language of which we communicate rather than statistics?

MR. FRAZIER: Objection, Your Honor. While Dr. Seberhagen might well be qualified to speak to that, I think this is well beyond the scope of the redirect.

THE COURT: It doesn't help me very much either way. Thank you very much.

BY MR. MEKBIB:

Q This morning you have testified that a number of 200 is somewhat a magical figure at

which you could have, at least as a sample data or the minimum base from which you can start computing statistical calculations with some confidence, is that correct, something to that effect?

A Yes.

Q Now you have calculated a lot of statistical conclusions in various charts that you have provided. In those numbers that you used, I did not see 200 at all. A lot of them are much more smaller than that. Why is it that, for one purpose, you needed 200 as a magic number to do such a statistical analysis and, for other purposes, numbers as low as six and seven have been used to compute statistical conclusions?

A I am glad you asked me that because I didn't explain it very well this morning. I would like to have a change to explain that.

When you do a statistical analysis, you are concerned really with about two things: One is whether you can rule out just random

variation, which is statistical significance. Practical significance means that -- if you find a difference that is a meaningful difference -- one that is not just a statistical artifact, but something that will have some value to the organization or for whatever purpose you are dealing with -- would be a validation study looking at the relationship[between education and work performance.

When you have a sample size of 42, you need to have a fairly large correlation between those two variables in order to achieve statistical significance, which merely means that you are ruling out random variation in the scores. The level of correlation coefficient between those two variables would have to be in the neighborhood of 30.30 to .35 on a scale that goes, basically, from -1 to +1, where a zero is no

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEBORAH QUICK SCALES,	
PLAINTIFF,	
-VERSUS-	DOCKET NO. CA 89-796
GEORGE WASHINGTON UNIVERSITY,	
DEFENDANT	WASHINGTON, D.C. APRIL 21, 1993 9:15 A. M.

. . . . . .

TRANSCRIPT OF TRIAL BEFORE
THE HONORABLE LOUIS F. OBERDORFER,
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

FOR THE PLAINTIFF: WENDU MEKBIB, ESQ.
KATHRYN CAMPBELL, ESQ.

FOR THE DEFENDANT: JACK FRAZIER, ESQ.
THOMAS QUINN, ESQ.

COURT REPORTER: SANTA THERESA ZIZZO,
U.S. DISTRICT COURT,
ROOM 4800C
3RD & CONSTITUTION AVE. N.W.
WASHINGTON, D.C. 20001

(COMPUTER-AIDED TRANSCRIPTION OF STENOTYPE NOTES)

PROCEEDINGS

(EXCERPT)

(MICHAEL TILLMAN, WITNESS FOR PLAINTIFF, SWORN)

DIRECT EXAMINATION

BY MR. MEKBIB:

Q GOOD AFTERNOON, MR. TILLMAN, AND THANK YOU FOR BEING HERE. LET ME START ASKING YOU QUESTIONS. WHAT IS YOUR CURRENT OCCUPATION?

A I'M A REGISTERED NURSE.

THE COURT: COULD YOU PULL THE MIKE CLOSE TO YOUR MOUTH, PLEASE?

A I'M A REGISTERED NURSE.

Q IS THAT WHAT YOU DO FOR A LIVING?

A YES, THAT'S WHAT I DO FOR A LIVING, YES, SIR.

Q DO YOU HAVE ANY POSITION? DO YOU WORK FOR ANYBODY AT THIS TIME?

A YES, SIR.

Q AND WHO IS THAT?

A I WORK FOR CHURCH HOSPITAL.

Q AND WHAT DO YOU DO FOR THEM?

A I'M THE DIRECTOR OF NURSING.

Q HOW LONG HAVE YOU BEEN THERE?

A FOUR YEARS.

Q FOUR YEARS. DID YOU EVER WORK FOR THE GEORGE WASHINGTON UNIVERSITY?

I WOULD LIKE TO SHOW YOU THAT DOCUMENT.

THE DEPUTY CLERK: IS IT 1A?

MR. MEKBIB: YES, 1A.

THE DEPUTY CLERK: DID YOU OFFER 1B INTO EVIDENCE?

MR. MEKBIB: YES, I DID OFFER THAT INTO EVIDENCE.

THE DEPUTY CLERK: DID YOU RECEIVE 1B?

THE COURT: WELL, IT'S SUBJECT TO AN OBJECTION AS TO RELEVANCY. I DID RECEIVE IT.

BY MR. MEKBIB:

Q MR. TILLMAN, DO YOU RECOGNIZE THIS DOCUMENT?

A WELL, IT'S ENTITLED THE MANUAL OF PERSONNEL DIRECTIVES, GEORGE WASHINGTON UNIVERSITY.

Q HAVE YOU SEEN THAT DOCUMENT WHEN YOU WERE AT GEORGE WASHINGTON UNIVERSITY?

A I CAN'T RECOLLECT.

Q YOU HAVE NO RECOLLECTION OF THIS DOCUMENT?

A OF THIS SPECIFIC DOCUMENT.

THE COURT: YOU DON'T HAVE TO ASK HIM SOMETHING TWICE, MR. MEKBIB. HE SAID HE DOESN'T. THAT'S IT.

BY MR. MEKBIB:

Q WAS THE GEORGE WASHINGTON UNIVERSITY HOSPITAL AN EQUAL EMPLOYMENT OPPORTUNITY EMPLOYER DURING THE TIME WHEN YOU WERE ASSOCIATE DIRECTOR AT THE UNIVERSITY?

A YES.
Q WAS THAT HOSPITAL AN AFFIRMATIVE ACTION EMPLOYER DURING THE PERIOD OF TIME THAT YOU WERE AN ASSOCIATE DIRECTOR OF NURSING?
A I DO NOT KNOW. I DON'T HAVE KNOWLEDGE OF THAT.
Q I SEE.
I WOULD LIKE YOU TO TURN PAGE TWO OF THAT EXHIBIT, SIR.
THE COURT: HE SAID HE DOESN'T KNOW THE EXHIBIT, MR. MEKBIB.
A I HAVE NO PAGE TWO, MR. MEKBIB.
Q THE SECOND PAGE FROM THE FIRST.
THE COURT: IS THIS IN AID OF YOUR FRAUD CASE?
MR. MEKBIB: I BEG YOUR PARDON, YOUR HONOR?
THE COURT: IS THIS BEING OFFERED IN AID OF YOUR FRAUD CLAIM WHICH I DISMISSED? IS THIS PARTICULAR TESTIMONY BEING OFFERED IN AID OF YOUR FRAUD CLAIM WHICH I DISMISSED?
MR. MEKBIB: NO, NO, YOUR HONOR, I'M SORRY.
BY MR. MEKBIB:
Q NOW, THIS PAGE THAT YOU ARE LOOKING AT STATES --
THE COURT: NOW, WAIT A MINUTE. I HATE TO KEEP INTERRUPTING YOU, BUT HE HAS NOT INDICATED THAT HE'S FAMILIAR WITH THIS DOCUMENT. IF YOU WANT TO PROVE THE DOCUMENT, WHICH YOU'RE PRIVILEGED TO DO, PROVE IT BY

THE COURT: AND, MR. MEKBIB, IT PURPORTS TO BE WHAT?

MR. MEKBIB: THE TOP INSCRIPTION OF THIS DOCUMENT IS A STANDARD INSCRIPTION --

THE COURT: JUST TELL ME WHAT IT PURPORTS TO BE. IT'S A LIST OF --

MR. MEKBIB: IT'S A LIST OF POSITIONS, OF VACANCIES.

THE COURT: A LIST OF VACANCIES AND THE MINIMUM SALARY.

MR. MEKBIB: YES.

THE COURT: HAVE YOU EVER SEEN A LIST OF POSITIONS WITH DEPARTMENT AND MINIMUM SALARY AT THE HOSPITAL?

THE WITNESS: YES.

THE COURT: ALL RIGHT. NOW, GO AHEAD.

BY MR. MEKBIB:

Q NOW, IF YOU WOULD PLEASE READ THE TOP PORTION OF THAT DOCUMENT?

A I CAN ONLY BEGIN FROM ABOUT THE SECOND SENTENCE.

THE COURT: READ IT OUT LOUD.

ASK HIM IF HE'S FAMILIAR WITH THE FOLLOWING LANGUAGE AND READ IT.

MR. MEKBIB: ALL RIGHT.

BY MR. MEKBIB:

BEST AVAILAB

Q LET ME ASK YOU THIS, ARE YOU FAMILIAR WITH THIS LANGUAGE, "THIS LISTING IS PROVIDED FOR EMPLOYEES OF THE GEORGE WASHINGTON UNIVERSITY MEDICAL CENTER AND IS NOT A PUBLIC ANNOUNCEMENT OF EMPLOYMENT VACANCIES. ALTHOUGH OTHERS MAY APPLY FOR ANY LISTED POSITION, QUALIFIED EMPLOYEES OF THE UNIVERSITY WILL BE CONSIDERED BEFORE APPLICANTS OUTSIDE THE UNIVERSITY. EMPLOYEES IN THE LISTED POSITIONS SHOULD CHECK THE ENTRY LEVEL QUALIFICATIONS," SO ON AND SO FORTH. HAVE YOU EVER COME ACROSS THIS INFORMATION IN THIS DOCUMENT OR SIMILAR DOCUMENTS?

A SPECIFICALLY, AS I UNDERSTAND YOUR QUESTION, DO I -- HAVE I SEEN THE INFORMATION ON THIS DOCUMENT?

THE COURT: WELL, LET'S ASK IT THIS WAY, ARE YOU AWARE OF ANY POLICY OF THE UNIVERSITY AS EXPRESSED IN THIS EXHIBIT THAT QUALIFIED EMPLOYEES WILL BE CONSIDERED BEFORE APPLICANTS OUTSIDE THE UNIVERSITY?

THE WITNESS: YES.

BY MR. MEKBIB:

Q WAS THAT A POLICY YOU WERE AWARE OF?

THE COURT: HE SAID HE WAS.

MR. MEKBIB: OH, I'M SORRY.

BY MR. MEKBIB:

Q NOW, WAS THERE NOT A POLICY THAT STATED THE FOLLOWING, THAT YOU WERE AWARE OF, THAT IN ORDER TO

LABLE COPY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEBORAH QUICK SCALES,

Plaintiff,

v.

GEORGE WASHINGTON UNIVERSITY,

Defendant.

Civil Action No. 89-796-LFO

FILED FEBRUARY 11, 1992

SUPPLEMENTAL STATEMENT OF GENUINE ISSUES OF MATERIAL FACTS WHICH, PLAINTIFF CONTENDS, NEED TO BE LITIGATED

In support of her Opposition to Defendant's Second Supplemental Motion for Summary Judgment, the plaintiff, Deborah Quick Scales, by and through her attorney, Wendu Mekbib, hereby respectfully proffers this supplemental statement of genuine issues of material facts, supported by the record, which, plaintiff contends, need to be litigated.

The plaintiff submits this statement as a supplement to the "Statement of Genuine Issues of Material Facts Which the Record Supports and

the Plaintiff Contends Need to be Litigated" filed on November 9, 1990. Specifically, pages 3 - 18 and pages 22 - 29 of the Statement of Genuine Issues are incorporated herein by reference and are deemed to be part and parcel of this statement.

Contested Issue of Material Fact 1

1. The plaintiff disputes the defendant claim that the "plaintiff has not asserted, with sufficient specificity, what statements were made regarding defendant's status as an EEO employer prior to the advertisements for the NUC position in 1986

Table clearly demonstrates the racially segregated work environment in which the plaintiff toiled for twenty one years. It shows that, for example, white nurses are promoted from Staff Nurse (SN) I to SN II positions within an average of 1.2 years. Similarly situated blacks are promoted in 2.6 years (more

(PAGES 2 - 3 OF ORIGINAL OMITTED)

TABLE I

Averages of Time Span for Promotional Mobility of Black and White Nurses from Staff Nurse Positions to Nursing Unit Coordinator Positions GWU Hospital

	From SN to SN II	From SN to ANC	Time as ANC ANUC or NS	From SN to NUC
WHITES:				
In months:	14.4	16.5	32.5	55.0
In years:	1.2	1.4	2.7	4.6
BLACKS:				
In months:	31.5	23.8	89.5	124.0
In years:	2.6	2.0	7.5	10.3

Source: Scales v. GWU, Loss Analysis Data, Dr. Fredric D. Abramson.

---

than twice the time needed to promote whites nurses.)

A white nurse spends an average of 2.7 years in post-staff nurse positions before he/she is promoted to the coveted position of Nursing Unit Coordinator (NUC). Altogether, a white nurse need only spend an average of 4.6 years to swoop through all the hierarchy of

positions between staff nurse and NUC positions!

On the other hand, a black nurse spends 7.5 years (almost three time as many years as whites!!!) in post-staff nurse positions before he/she is promoted to NUC position. And, the total number of years a black nurse needs to be promoted from staff nurse to NUC position is an average of 10.3 years!

GEORGE WASHINGTON UNIVERSITY

DEPARTMENT OF NURSING

Work Force Analysis Report

Period: 1/1/81 - 8/2/89

RECEIVED
OCT 12 1993
CLERK OF THE UNITED
STATES COURT OF APPEALS

TABLE 1

NURSING MANAGEMENT POSITIONS

Job title	Grade	TOTAL INCUMBENTS: All Empls	Males	Females	White	Black	Others
DIRECTOR OF NURSING	*	1	0	1	1	0	0
ASSOCIATE DIRECTOR OF NURSING	21	22	1	21	20	2	0
NURSING UNIT COORDINATOR	20	60	2	58	52	5	3
NURSING COORDINATOR	20	25	1	24	21	3	1
COORDINATOR, NURSING RESEARCH	19	3	0	3	3	0	0
NURSING SUPERVISOR	19	20	1	19	19	1	0
NURSING EDUCATIONAL COORDINATOR	19	27	1	26	25	1	1
NURSING SPECIALIST	18	18	1	17	16	1	1
NURSING PROJECTS COORDINATOR	18	3	0	3	2	0	1
NURSING PRACTITIONER	16	23	1	22	21	2	0
CLINICAL NURSE IV & V (ANC)	*	308	12	296	253	40	15
EXECUTIVE ASSOCIATE	15	2	0	2	1	1	0
ADMINISTRATIVE DIVISIONAL COORDINATOR	13	14	3	11	10	4	0
SUPERVISOR, PATIENT ESCORT	11	6	0	6	5	1	0
totals:		532	23	509	449	61	22

COMBINED TOTALS:.....>		White	Blacks	Others
* Unidentified	#	449	61	22
	%	84.4	11.5	4.1

Source: Nursing Department, George Washington University Medical Center

PLAINTIFF'S EXHIBIT 143-A

USCA No. 93-7151
Motion for Summary Reversal
Appellant Exhibit # 3

GEORGE WASHINGTON UNIVERSITY MEDICAL CENTER

DEPARTMENT OF NURSING

TABLE 1A

PERCENT OF BLACKS AND WHITES IN NURSING MANAGEMENT POSITIONS BY JOB TITLE

Job Title	Total Employees #'s	White Employees %	Black Employees %
Director of Nursing	1	100.0	—
Associate Director of Nursing	22	90.9	9.1
Nursing Unit Coordinator	60	86.7	8.3
Nursing Coordinator	25	84.0	12.0
Coordinator, Nursing Research	3	100.0	—
Nursing Supervisor	20	95.0	5.0
Nursing Education Coordinator	27	92.6	3.7
Nursing Specialist	18	88.9	5.6
Nursing Projects Coordinator	3	66.7	—
Nurse Practitioner	23	91.3	8.7
Clinical Nurse IV & V (formerly Asst. Nurs. Coord.)	308	82.1	13.0
TOTALS	510	84.9	10.8

NOTE: The Executive Associate, Administrative Div. Coordinator, and Supervisor, Patient Escort positions are not shown in this Table.

PLAINTIFF'S EXHIBIT 165-B

GEORGE WASHINGTON UNIVERSITY MEDICAL CENTER

DEPARTMENT OF NURSING

TABLE 2

NURSING PROFESSIONALS BY RACE AND JOB TITLE

BETWEEN JANUARY 1, 1981 AND AUGUST 2, 1989

JOB TITLE	TOTAL #'s	WHITE	BLACK	OTHERS
Nursing Administrator	6	6	0	0
Chief Nurse Anesthetist	3	3	0	0
Nurse Epidemiologist	3	3	0	0
Nurse Reviewer	12	11	1	0
Nurse Recruiter	3	3	0	0
Nurse Specialist	18	16	1	1
Nurse Specialist (Clinic)	45	44	1	0
Mid-Level Practitioner	66	62	2	2
Nurse Anesthetist	11	7	3	1
Staff Nurse (Clinic)	56	47	6	3
Staff Nurse II*	845	704	78	63
Staff Nurse I*	1,322	1,105	140	77
Clinical Nurse III*	279	214	33	32
Clinical Nurse II*	79	63	11	5
Clinical Nurse I*	56	41	8	7
TOTALS	2,804	2,329	284	191

Source: Nursing Department, George Washington University Medical Center

* Staff Nurse positions were reclassified as Clinical Nurse positions as of July, 1988.

NOTE: The TOTAL shown excludes 67 individuals whose races are not identified.

PLAINTIFF'S EXHIBIT 163-C

GEORGE WASHINGTON UNIVERSITY MEDICAL CENTER

DEPARTMENT OF NURSING

TABLE 2A

PERCENT OF BLACKS AND WHITES IN NURSING PROFESSIONAL POSITIONS BY JOB TITLE

Job Title	Total Employees #'s	White Employees %	Black Employees %
Nursing Administrator	6	100.0	—
Chief Nurse Anesthetist	3	100.0	—
Nurse Epidemiologist	3	100.0	—
Nurse Reviewer	12	91.7	8.3
Nurse Recruiter	3	100.0	—
Nurse Specialist	18	88.9	5.6
Nurse Specialist (Clinic)	45	97.8	2.2
Mid-Level Practitioner	66	93.9	3.0
Nurse Anesthetist	11	63.6	27.3
Staff Nurse (Clinic)	56	83.9	10.7
Staff Nurse I & II*	2,167	83.5	10.1
Clinical Nurse I, II, III*	414	76.8	12.6
TOTALS	2,804	83.1	10.1

Source: Nursing Department, George Washington University Medical Center, period: 1/1/81 - 8/2/89

* Staff Nurse positions were reclassified as Clinical Nurse positions as of July, 1988.

GEORGE WASHINGTON UNIVERSITY MEDICAL CENTER

DEPARTMENT OF NURSING

TABLE 3

ALL NURSING MANAGEMENT AND PROFESSIONAL POSITIONS REQUIRING REGISTERED NURSE LICENSES IN THE DISTRICT OF COLUMBIA BY RACE AND JOB TITLE

Job Title	Total #'s	White #'s	Black #'s	Others #'s
Director, Nursing Services	1	1	0	0
Associate Director, Nursing Serv.	22	20	2	0
Associate Director, Nursing Continuing Education	1	1	0	0
Nursing Unit Coordinator	60	52	5	3
Nursing Supervisor	20	19	1	0
Clinical Nurse IV & V (Clinical Nurse IV formerly Asst. Nurse Coordinator)	308	253	40	15
Nurse Practitioner	23	21	2	0
Administrative Div. Coord.	14	10	4	0
Nursing Educational Coord.	27	25	1	1
Nursing Coordinator, Cont. Educ.	4	2	1	1
Nursing Specialist	18	16	1	1
Coordinator, Nursing Research	3	3	0	0
Nursing Projects Coordinator	3	2	0	1
Staff Nurse I & II*	2,167	1,809	218	140
Clinical Nurse I, II, III*	414	318	52	44
TOTAL	3,085	2,552	327	206

Source: Nursing Department, George Washington University Medical Center, period: 1/1/81 - 8/2/89

* Staff Nurse positions were reclassified as Clinical Nurse positions as of July, 1988.

PLAINTIFF'S EXHIBIT 163-E

GEORGE WASHINGTON UNIVERSITY MEDICAL CENTER

DEPARTMENT OF NURSING

TABLE 3A

PERCENT OF NURSING MANAGEMENT AND PROFESSIONAL POSITIONS REQUIRING REGISTERED NURSE LICENSES IN THE DISTRICT OF COLUMBIA BY RACE AND JOB TITLE

Job Title	Total #'s	White %	Black %
Director, Nursing services	1	100.0	—
Associate Director, Nursing Serv.	22	90.9	9.1
Associate Director, Nursing Continuing Education	1	100.0	—
Nursing Unit Coordinator	60	86.7	8.3
Nursing Supervisor	20	95.0	5.0
Clinical Nurse IV & V (Clinical Nurse IV formerly Asst. Nurse Coordinator)	308	82.1	13.0
Nurse Practitioner	23	91.3	8.7
Administrative Div. Coord.	14	71.4	28.6
Nursing Educational Coord.	27	92.6	3.7
Nursing Coordinator, Cont. Educ.	4	50.0	25.0
Nursing Specialist	18	88.9	5.6
Coordinator, Nursing Research	3	100.0	—
Nursing Projects Coordinator	3	66.7	—
Staff Nurse I & II*	2,167	83.5	10.1
Clinical Nurse I, II, III*	414	76.8	12.6
TOTAL	3,085	82.7	10.6

Source: Nursing Department, George Washington University Medical Center, period: 1/1/81 - 8/2/89

* Staff Nurse positions were reclassified as Clinical Nurse positions as of July, 1988.

PLAINTIFF'S EXHIBIT 163-E

GEORGE WASHINGTON UNIVERSITY MEDICAL CENTER

DEPARTMENT OF NURSING

TABLE 4

NUMBERS OF EMPLOYEES IN NURSING CLERICAL, SEMI-SKILLED, AND PARA-PROFESSIONAL POSITIONS BY JOB TITLE AND RACE

Job Title	Total #'s	Black #'s	White #'s	Others #'s	Unidentified Others #'s
Licensed Prac.Nurse II	113	90	15	8	0
Licensed Prac.Nurse I	113	83	25	4	1
Operating Room Tech.	50	39	9	2	0
Nurse Technician	90	19	48	18	5
Sr. Operating Room Tech.	169	103	54	7	5
Instrument Tech.	11	4	6	0	1
Dialysis Technician	15	4	11	0	0
Sr. Medical Secretary	15	3	7	2	3
Secretary	63	43	9	1	10
Station Secretary	688	501	131	27	29
Executive Aide	39	24	11	4	0
Sr. Clerk	66	39	16	4	7
Clerk	29	20	4	3	2
Surgical Post Clerk	19	7	7	5	0
Sr. Nursing Div. Asst.	8	8	0	0	0
Nursing Division Asst.	98	43	51	0	4
Sr. Nursing Asst.	634	478	[illegible]	36	53
Psych Technician	105	46	53	3	3
Nursing Assistant	314	249	26	29	10
Disp. Patient Escort	25	24	1	0	0
Patient Escort	264	216	9	13	26
Equipment Technician	8	0	0	8	0
EKG Technician	31	13	6	8	4
TOTAL	2,967	2,056	566	182	163

Source: Nursing Department, George Washington University Medical Center, period: 1/1/81 - 8/2/89

PLAINTIFF'S EXHIBIT 163-6

GEORGE WASHINGTON UNIVERSITY MEDICAL CENTER

DEPARTMENT OF NURSING

TABLE 4A

PERCENT OF EMPLOYEES IN NURSING CLERICAL, SEMI-SKILLED, AND PARA-PROFESSIONAL POSITIONS BY JOB TITLE AND RACE

Job Title	Total #'s	Black %	White %
Licensed Practical Nurse II	113	79.6	13.3
Licensed Practical Nurse I	113	73.5	22.1
Operating Room Technician	50	78.0	18.0
Nurse Technician	90	21.1	53.3
Sr. Operating Room Technician	169	60.9	32.0
Instrument Technician	11	36.4	54.5
Dialysis Technician	15	26.7	73.3
Sr. Medical Secretary	15	20.0	46.7
Secretary	63	68.3	14.3
Station Secretary	688	72.8	19.0
Executive Aide	39	61.5	28.2
Sr. Clerk	66	39.1	24.2
Clerk	29	69.0	13.8
Surgical Post Clerk	19	36.8	36.8
Sr. Nursing Div. Assistant	8	100.0	—
Nursing Division Assistant	98	43.9	52.0
Sr. Nursing Assistant	634	75.4	10.6
Psych Technician	105	43.8	50.5
Nursing Assistant	314	79.3	8.3
Disp. Patient Escort	25	96.0	4.0
Patient Escort	264	81.8	3.4
Equipment Technician	8	—	—
EKG Technician	31	41.9	19.4
TOTAL	2,967	69.3	19.1

Source: Nursing Department, George Washington University Medical Center, period: 1/1/81 - 8/2/89

NOTE: "Others" and "Unidentified Others" are included in Totals.

PLAINTIFF'S EXHIBIT 163-H

TABLE 5

COMPARISONS OF AVERAGE REPRESENTATION IN SELECTED JOB GROUPS--BLACK AND WHITE NURSING STAFFS

Job Groups	White Employees $\bar{X}_1$	Black Employees $\bar{X}_2$	Significance Test Z (0.05 level)
All Nursing Management Positions (Table 1)	32.07	4.36	34.40 > 1.96
All Nursing Management and Professional positions requiring licenses in the District of Columbia (Table 3)	170.13	21.80	158.08 > 1.96
Nursing Unit Coordinator and Nursing Coord. (Table 1)	36.50	4.00	93.28 > 1.96
Coordinator, Nursing Research, Nursing Supervisor, and Nursing Educ.Coord. (Table 1)	15.67	0.67	28.16 > 1.96
Nursing Specialist and Nursing Projects Coord. (Table 1)	9.00	0.50	9.49 > 1.96
Nurse Practitioner and Clinical Nurse IV & V (Table 1)	137.00	21.00	132.39 > 1.96
All Clerical, Semi-Skilled, Para-Professionals (Table 4)	24.61	89.39	157.44 > 1.96

NOTES: The differences in the averages (i.e., "means") of representation for whites and blacks in the selected Job Groups ($\bar{X}_1 - \bar{X}_2$) have been found to be "statistically significant" using the Z test, i.e., the differences between black and white representation in the selected job groups are not attributable to "chance" or random variables at the 0.05 level of confidence. (See attached tables of "The Area Under the Normal Curve".) Thus, it may be inferred that the differences in the average representations are reflective of a pattern of employment discrimination based on race.

In addition, the values of Z greater than 1.96 in this Table show that white nursing representation dominates management positions while black nursing representation dominates the lowest grade and salary positions.

PLAINTIFF'S EXHIBIT 169-I

TABLE 18

COMPARISON OF AVERAGE "OVERALL PERFORMANCE RATINGS"

FOR NURSING UNIT COORDINATORS BY EDUCATION LEVELS, 1981-89:

A TEST FOR STATISTICAL SIGNIFICANCE OF DIFFERENCES IN SAMPLE MEANS

Nursing Position	Average "Overall Performance Ratings"			Significance Test t (0.05 level)		
	MASTER'S DEGREE $\bar{Y}_1$	BACHELOR'S DEGREE $\bar{Y}_2$	DIPLOMA/ASSOCIATE'S DEGREE $\bar{Y}_3$	calculated t		critical value of t
NURSING UNIT COORD.	1.58	1.62	—	0.2694	<	2.035
	1.58	—	1.37	1.056	<	2.035

FINDINGS AND CONCLUSIONS

The differences in the average performance ratings, i.e., "means" = $\bar{Y}_i$, between Nursing Unit Coordinators with Master's Degrees and those with Bachelor's Degrees; and between Nursing Unit Coordinators with Master's Degrees and those with Diplomas/Associate's Degrees, have been found not to be statistically significant at the 0.05 percent level using the t test. Since whatever the differences in the average performance ratings, i.e., -0.04 (Master's and Bachelor's) and 0.21 (Master's and Associate's), and since the calculated values of t are smaller than the "critical values" of t = 2.035, there is a .95 percent level of confidence that such differences are due only to "chance" or "random variation". (See attached table of Critical Values of t.)

Thus, it may be inferred that there are no statistically significant differences in the average overall performance ratings of Nursing Unit Coordinators associated with the education levels identified.

Data Source: Personnel Files of Individuals in Nursing Unit Coordinator positions between 1981 and 1989, George Washington University Medical Center.

APPENDIX TO TABLE 18

NURSING UNIT COORDINATORS

Average "Overall Performance Rating"

N = 42

MASTER'S DEGREE	BACHELOR'S DEGREE	DIPLOMAS/ASSOCIATE'S DEGREE
1.75	1.67	1.90
1.00	1.00	1.38
1.83	1.71	2.00
1.00	2.00	1.00
2.00	1.67	1.33
1.50	1.50	1.00
2.00	1.00	1.00
2.00	2.00	
1.50	2.00	Sum 9.61
1.00	1.75	$\bar{X}_3$ 1.3729
2.00	1.75	
1.33	0.67	
	1.09	NOTE: For this analysis, "ratings" were assigned values as follows:
Sum 18.91	1.25	EXCEEDS REQUIREMENTS(ER) = 2
$\bar{X}_1$ 1.5758	2.00	MEETS REQUIREMENTS(MR) = 1
	2.00	DOES NOT MEET REQUIREMENTS(DNMR) = 0
	2.00	
	2.00	
	2.00	
	2.00	
	1.71	
	1.00	
	1.50	
	Sum 37.27	
	$\bar{X}_2$ 1.6204	

Data Source: Personnel Files of Individuals in Nursing Unit Coordinator positions between 1981 and 1989, George Washington University Medical Center.

TABLE 19

STATISTICAL RELATIONSHIP BETWEEN NURSING EDUCATION LEVELS AND AVERAGE "OVERALL PERFORMANCE RATINGS" FOR NURSING UNIT COORDINATORS, 1981-89: A REGRESSION ANALYSIS

VARIABLES:

(1) Y = average "overall performance rating" for all nurses who held Nursing Unit Coordinator positions, 1981-89

(2) X_1 = levels of nursing education

DATA:

(1) average "overall performance ratings":

(a) Exceeds Requirements(ER) = 2

(b) Meets Requirements(MR) = 1

(c) Does Not Meet Requirements(DNMR) = 0

(2) levels of nursing education

(a) master's degree = 3

(b) bachelor's degree = 2

(c) diploma/associate's degree = 1

(3) number of observations(N) = 42

REGRESSION EQUATION:

$$Y = 1.3974 + 0.0798X_1$$

S_{yx} = Standard error of estimate = 0.4197

r = correlation coefficient = 0.128

r^2 = coefficient of determination = 0.016

Data Source: Personnel Files of Individuals in Nursing Unit Coordinator positions between 1981 and 1989, George Washington University Medical Center.

TABLE 19 COMMENTS

Highlights

- The regression coefficient (0.0798) shows that average "overall performance ratings" increase or decrease very little when education levels increase or decrease.

- The standard error of the estimate (0.4197) shows that the differences between the actual performance ratings and the estimated performance ratings are relatively large which suggests a poor relationship between education levels and performance ratings with respect to the Nursing Unit Coordinator position.

- The correlation coefficient (0.128) shows that there is very little correlation between average performance ratings for Nursing Unit Coordinators and their levels of education. Moreover, the coefficient of determination (0.016) shows that only about 2 percent of the variation in average performance ratings can be accounted for or explained by differences in education levels.

Conclusions

- Since 98 percent of the variation in average performance ratings is accounted for or explained by all other factors, it is then reasonable to infer that education levels of Nursing Unit Coordinators are the least important factors associated with overall performance and overall performance ratings, i.e., there is no evidence that a Nursing Unit coordinator with a master's degree would perform the functions and duties any better or worse than a Nursing Unit Coordinator with a bachelor's degree, on average.

APPENDIX TO TABLE 19

DATA USED IN REGRESSION ANALYSIS

N = 42

NURSING UNIT COORDINATOR OVERALL PERFORMANCE RATINGS, 1981-89

AVERAGE RATINGS	EDUCATION LEVELS	AVERAGE RATINGS	EDUCATION LEVELS
1.75	3	1.09	2
1.00	3	1.25	2
1.83	3	2.00	2
1.00	3	2.00	2
2.00	3	2.00	2
1.50	3	2.00	2
2.00	3	2.00	2
2.00	3	2.00	2
1.50	3	1.71	2
1.00	3	1.00	2
2.00	3	1.50	2
1.33	3	1.90	1
1.67	2	1.38	1
1.00	2	2.00	1
1.71	2	1.00	1
2.00	2	1.33	1
1.67	2	1.00	1
1.50	2	1.00	1
1.00	2		
2.00	2		
2.00	2		
1.75	2		
1.75	2		
0.67	2		

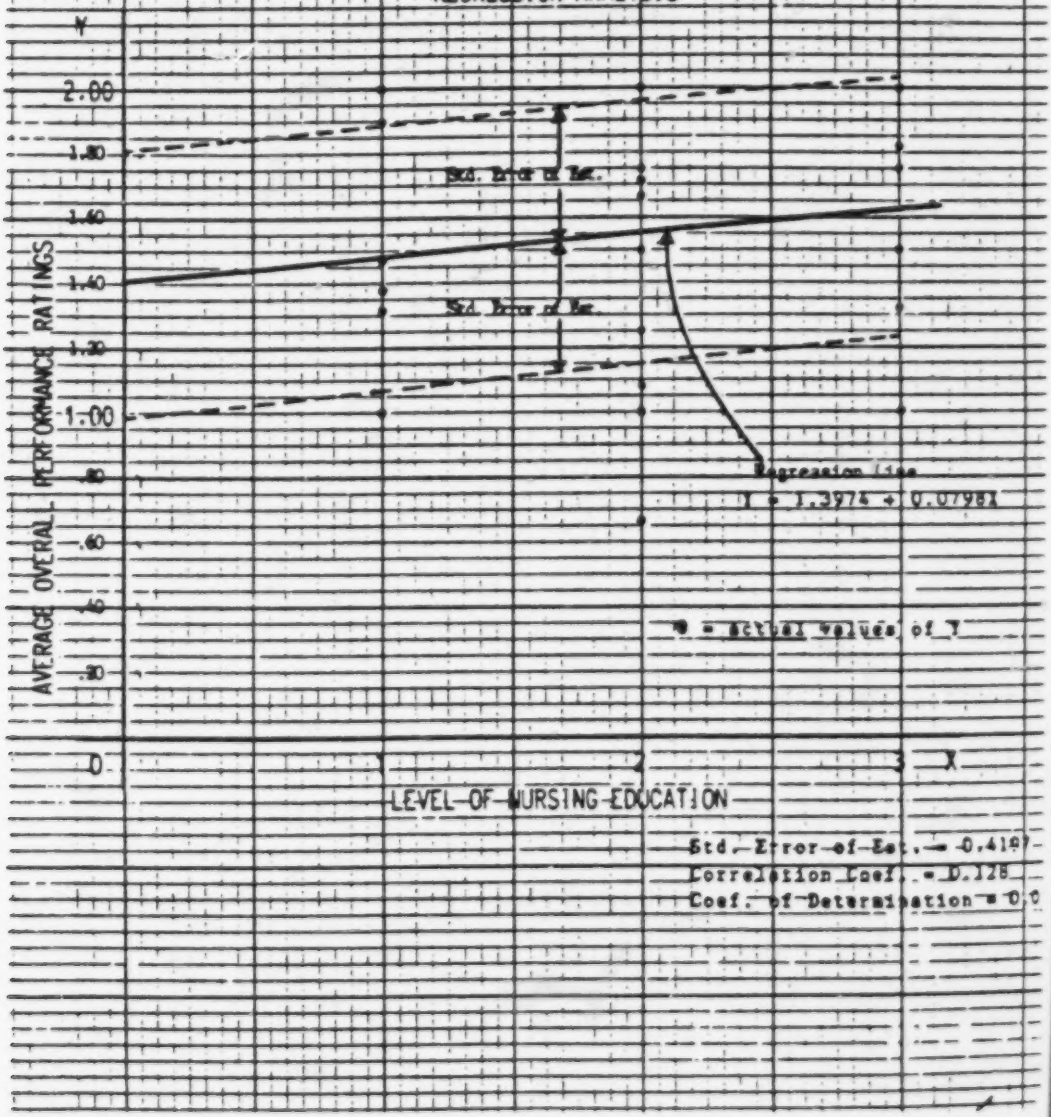
Data Source: Personnel Files of Individuals in Nursing Unit Coordinator positions between 1981 and 1989, George Washington University Medical Center.

FIGURE 1

DEPARTMENT OF NURSING, GEORGE WASHINGTON UNIVERSITY MEDICAL CENTER

RELATIONSHIP BETWEEN LEVEL OF EDUCATION AND AVERAGE OVERALL PERFORMANCE RATINGS

REGRESSION ANALYSIS



GEORGE WASHINGTON UNIVERSITY

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DIRECTIVE II	SUBJECT: Recruitment, Employment, Promotion, Demotion, and Transfer
EFFECTIVE DATE: June 1, 1978	SUPERSEDES: Manual of Personnel Directives dated September 1, 1973

II – A. GENERAL STATEMENT

1. All recruitment, employment, promotion, demotion, transfer and reinstatement of employees shall be subject to the policies of non-discrimination set out in Directive I.

2. All vacancies in classified positions shall be reported to the Personnel Services Office of the University or the Medical Center.

B. RECRUITMENT

1. The department head will complete the employee requisition form, Pers-13, and send it to the appropriate Budget Office.

2. After approval by the appropriate budget office, this form is sent to Personnel Services and recruitment begins.

3. Before outside recruitment sources are explored, Personnel Services will review its applicant files, including those previously screened for University employment.

4. Personnel Services will post job vacancies throughout the University as provided for in D-3 below, will place ads in newspapers and other publications, and distribute vacancy lists to placement services of educational institutions and to local public and private agencies.

5. All ads will carry the "Equal Opportunity Employer" line and shall not state preference for male or female except where sex is a bona fide occupational qualification.

C. EMPLOYMENT

1. Procedures

a. Application for employment in all classified positions shall be made on forms and in such manner as prescribed by the Director of Personnel Services.

b. Applicants will be evaluated based on a personal interview, verification of references, performance on validated tests where applicable and physical fitness for the job vacancy.

c. The Director of Personnel Services may disqualify or refuse to consider any applicant who, upon investigation, is found to lack any of the requirements established for the position for which he/she is applying, is physically unable to perform the duties of the position or where based on verified information, it would be a disservice to the University to consider the applicant.

DIRECTIVE I	SUBJECT: Equal Employment Opportunity
EFFECTIVE DATE: June 1, 1976	SUPERSEDES: Manual of Personnel Directives dated September 1, 1973

I – A. Equal employment opportunity shall govern in all personnel policies and shall include, but not be limited to:

1. To recruit, hire and promote in all job classifications without regard to race, color, sex, national origin, age or physical/mental handicap except where sex is a bona fide occupational qualification or where a physical/mental handicap is a bona fide occupational disqualification.

2. To base decisions on employment so as to further the principle of equal employment opportunity.

3. To insure that promotion decisions are in accord with principles of equal employment opportunity by imposing only valid requirements for promotional opportunities.

4. To insure that all other personnel actions such as compensation, benefits, transfer, layoffs, return from layoff, University sponsored training, education, tuition assistance, social and recreation programs are administered without regard to race, color, religion, sex, national origin, age or physical/mental handicap, except where sex is a bona fide occupational qualification or where a physical/mental handicap is a bona fide occupational disqualification.

B. The University's Affirmative Action Plans

1. Copies of the Affirmative Action Plans are available to any employee upon request from the Office of Personnel Services.

2. All members of management and supervision are to make themselves knowledgeable of the University's Affirmative Action Plans and are to commit themselves to achieving the goals and objectives of the Plans.

COMPARATIVE CHART I

NAME	RACE	EDUCATION	Pre-NUC GWU Hospital Experience			Performance Evaluations			Promoted To, Or Hired As, NUC
			Position	Dates	Length (Years)	Position	Date	Overall Rating	
Deborah Quick Scales	**BLACK**	MSN, May 1991 BSN, June 1979 Associate Degree, Nursing, 1974 - Practical Nurse Certificate, 1966	ANUC ANC SN II SN I LPN	11/86 - 06/87 12/79 - 10/86 07/76 - 11/79 06/74 - 07/76 10/66 - 05/74	0.66 6.83 3.33 2.00 7.50 20.32	ANUC ANC ANC ANC ANC ANC ANC ANC ANC	7/87 8/86 8/85 1/84 7/83 11/82 1/82 7/81 7/80	Exceeds Exceeds Exceeds Exceeds Exceeds Meets Exceeds Exceeds Exceeds	Promotion Denied 12/15/86 Promotion Denied 3/27/87
Terry T. Cappo	**WHITE**	Associate Degree (2 year program) NVCC, May 1978	ANUC ANC SN II	3/88 - 6/88 10/87 - 2/88 10/83 - 9/87	0.25 0.33 4.00 4.58	NUC ANUC ANC	4/89 4/88 1/88	Meets Meets Meets	Promoted to NUC 7/7/88
Jeweleen Easoglou	**WHITE**	Associate Degree (3 year program)	ANUC ANC NS ANC SN II SN I	2/84 - 1/85 5/83 - 2/84 7/81 - 5/83 7/79 - 7/81 8/77 - 7/79 6/75 - 7/77	0.92 0.75 1.83 1.00 0.95 2.00 7.45	NUC NUC ANUC NS ANC ANC	5/86 5/85 7/84 5/83 4/81 7/79	Meets Meets Meets Meets Exceeds Exceeds	Promoted to NUC 2/4/85
Karen Drenkard	**WHITE**	BSN, June 1980	SN II SN I	9/81 - 7/83 6/80 - 8/81	1.83 1.17 3.00	NUC NUC NUC	5/86 4/85 6/84	Exceeds Exceeds Meets	Promoted to NUC from SN II on 8/15/83

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Appellant Exhibit # 4

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COMPARATIVE CHART II

NAME	RACE	EDUCATION	Pre-NUC GWU Hospital Experience			Performance Evaluations			Promoted To, Or Hired As, NUC
			Position	Dates	Length (Years)	Position	Date	Overall Rating	
Karen Hicks	WHITE	BSN, June 1980	ANC SN II SN I	4/86 - 1/88 7/85 - 3/86 8/84 - 7/85	1.50 0.66 1.00 3.16	SN II SN II SN I SN I SN I	3/86 3/86 6/85 11/85 2/84	Exceeds Meets Exceeds Exceeds Meets	Promoted To NUC On 1/11/88
Mary Jane Edwards	WHITE	BSN (date unknown)	NONE			NUC	4/89	Meets	Hired as NUC on 10/28/88
Patricia L. Durgin	WHITE	BSN, 1986	NONE			NUC NUC	4/89 4/88	Exceeds Meets	Hired as NUC on 9/21/87
Delores E. Jewell	WHITE	BSN, 1978	ANC SN II SN I	1/83 - 1/84 10/81 - 1/83 3/81 - 10/81	1.00 1.16 0.58 2.74	NUC NUC NUC NUC	4/88 4/87 4/86 4/84	Exceeds Exceeds Exceeds Meets	Promoted to NUC on 1/15/84
Kathleen Metcalf	WHITE	BSN, 1980	ANC SN II SN I	1/85 - 8/87 7/84 - 1/85 5/84 - 7/84	2.58 0.42 0.17 3.17	NUC	4/88	Exceeds	Promoted to NUC on 8/12/87

PLAINTIFF'S EXHIBIT 165-B

COMPARATIVE CHART III

NAME	RACE	EDUCATION	Pre-NUC GWU Hospital Experience			Performance Evaluations			Promoted To, Or Hired As, NUC
			Position	Dates	Length (Years)	Position	Date	Overall Rating	
Diane Olechna	WHITE	BSN, May 1984	NONE			NUC NUC NUC NUC	3/89 4/88 4/87 4/85	Exceeds Exceeds Exceeds Exceeds	Hired as NUC on 7/2/84
Ann Frizzell	WHITE	MSN, May 1991 BSN, August 1979	ANUC NS ANC SN II SN I	8/87 - 12/87 5/86 - 07/87 7/84 - 04/86 9/82 - 06/84 5/81 - 08/82	0.34 1.17 1.75 1.75 1.25 6.26	SN II SN II SN I SN I SN I	11/83 11/82 8/82 10/81 10/81	Exceeds Meets Exceeds Meets Meets	Promoted to NUC on 12/27/87
Susan Parker	WHITE	BSN, 1980	ANUC ANC SN II SN I	3/84 - 07/84 5/82 - 03/84 10/81 - 05/82 7/80 - 10/81	0.34 1.83 0.58 1.25 4.00	NUC NUC	4/86 5/85	Exceeds Exceeds	Promoted to NUC on 7/1/84
Judith J. Stark	WHITE	BSN (date unknown)	NONE			NUC NUC NUC NUC NUC NUC	4/88 4/87 5/86 5/85 5/84 5/83	Exceeds Exceeds Exceeds Exceeds Exceeds Meets	Hired as NUC 10/82

PLAINTIFF'S EXHIBIT 165-C

COMPARATIVE CHART IV

NAME	RACE	EDUCATION	Pre-NUC GWU Hospital Experience			Performance Evaluations			Promoted To, Or Hired As, NUC
			Position	Dates	Length (Years)	Position	Date	Overall Rating	
Mary E. House	WHITE	BSN (date unknown)	NONE			NUC	4/85	Exceeds	Hired as NUC 4/82
						NUC	4/84	Exceeds	
						NUC	4/83	Exceeds	
						NUC	4/82	Meets	
Janice B. Lisee	WHITE	BSN, June 1970	NS	6/78 - 10/81	3.33	NUC	1/85	Meets	Promoted to NUC 10/81
			SN II	1/76 - 6/78	2.42	NUC	11/84	Does not meet	
					5.75	NUC	7/84	Meets	
Jeane Marquis	WHITE	BSN, June 1972	SN II	9/76 - 7/79	2.83	NUC	8/83	Exceeds	Promoted to NUC from SN II on 7/29/79
						NUC	4/82	Exceeds	
						NUC	4/29	Exceeds	
						NUC	6/28	Exceeds	
Theresa Terry	BLACK	BSN, 1977	ANC	7/83 - 8/88	5.00	ANC	6/88	Exceeds	Promotion to NUC Denied 4/8/85
			SN II	2/82 - 7/83	1.42	ANC	4/88	Exceeds	
			SN I	7/80 - 2/82	1.58	ANC	6/87	Exceeds	
					8.00	ANC	7/86	Exceeds	
						ANC	8/85	Exceeds	
						ANC	7/84	Exceeds	
						ANC	11/83	Exceeds	

PLAINTIFF'S EXHIBIT 165-D

COMPARATIVE CHART V

NAME	RACE	EDUCATION	Pre-NUC GWU Hospital Experience			Performance Evaluations			Promoted To, Or Hired As, NUC
			Position	Dates	Length (Years)	Position	Date	Overall Rating	
Rita Smith	WHITE	BSN, 1971	UNKNOWN			NUC	4/89	Exceeds	Date of Promotion Unknown
Robin P. Smith	WHITE	3 Year Diploma	ANUC	6/80 - 3/81	0.83	NUC	5/83	Exceeds	Promoted to NUC on 3/1/81
			ANC	3/80 - 5/80	0.25	NUC	4/82	Exceeds	
			SN II	10/79 - 2/80	0.42	NUC	4/81	Exceeds	
			SN I	5/79 - 9/79	0.42	NUC	11/80	Meets	
				Total	1.92	SN II	4/80	Meets	
						ANC	?		
Maria Jean Floyd	BLACK	BSN, 1976	ANC	1/83 - ?	?	ANC	6/89	Exceeds	Promotion Denied
			ANUC	12/81 - 1/83	1.17	ANC	6/88	Exceeds	
			ANC	3/81 - 11/81	0.75	ANC	6/87	Exceeds	
			SN II	9/80 - 2/81	0.50	ANC	7/86	Exceeds	
				Total	?	ANC	7/85	Exceeds	
						ANC	6/84	Exceeds	
						ANC	11/83	Exceeds	
						ANUC	4/82	Meets	
						ANC	11/81	Exceeds	
						ANC	7/81	Exceeds	
Lomar Q. Yap	ASIAN	BSN, 1969	ANUC	4/85 - 8/85	0.42	NUC	5/88	Exceeds	Promoted to NUC on 8/25/85
			ANC	10/84 - 3/85	0.50	NUC	4/87	Exceeds	
			SN II	7/4 - 10/84	0.33	NUC	4/86	Meets	
				Total	1.25	NUC	1/86	Meets	
						ANC	2/85	Meets	

PLAINTIFF'S EXHIBIT 165-E

COMPARATIVE CHART VI

NAME	RACE	EDUCATION	Pre-NUC GWU Hospital Experience			Performance Evaluations			Promoted To, Or Hired As, NUC
			Position	Dates	Length (Years)	Position	Date	Overall Rating	
Lillia Lortz-Lim	HISPANIC	MSN, July 1987 BSN, May 1980	ANC ANUC ANC SN II SN II SN I AN..	8/86 - 2/87 5/86 - 8/86 9/84 - 5/86 2/84 - 8/84 7/83 - 2/84 6/80 - 9/80 5/79 - 6/80 Total	0.42 0.25 1.58 0.50 0.50 0.25 1.00 4.50	NUC ANC ANC	4/88 7/86 7/85	Exceeds Exceeds Exceeds	Promoted to NUC on 2/5/87
Ruth Boylan (Albaugh)	WHITE	BSN, 1978	ANC SN II SN I	?/80 - ?/81 ?/79 - ?/80 5/78 -?/79 Total	? ? ? ?	NUC ANUC NUC ANC	4/82 6/81 4/81 5/80	Meets Meets Meets Meets	Promoted to NUC on ?/?/81
Judith Goss	WHITE	Unknown	ANUC CES	10/88 - 5/89 ?/? - 11/88 Total	0.67 ? ?	ANUC	4/89	Exceeds	Promoted to NUC on 6/1/89
Kathleen Allshouse	WHITE	Unknown	NUC NS ANC SN II SN I	8/81 - ?/? 3/81 - 8/81 ?/75 - 3/81 ?/? - ?/? ?/? - ?/? Total	? 0.50 ? ? ? ?	NUC NUC NUC NUC ANC ANC ANC ANC	5/84 4/83 4/82 5/81 10/80 8/79 7/77 7/76	Exceeds Exceeds Exceeds Exceeds Exceeds Exceeds Exceeds Exceeds	Date of Promotion Unknown

PLAINTIFF'S EXHIBIT
Hos-E

COMPARATIVE CHART VII

NAME	RACE	EDUCATION	Pre-NUC GWU Hospital Experience			Performance Evaluations			Promoted To, Or Hired As, NUC
			Position	Dates	Length (Years)	Position	Date	Overall Rating	
Paulita B. Amigo	ASIAN	BSN (date unknown)	NUC (R) NC III NC II Hired 9/69	4/78 - ?/? 6/74 - 4/78 ?/? - 6/74 Total	? 3.92 ? ?	NUC NUC NUC NUC NUC NUC NUC NUC NUC NUC	5/87 4/86 4/85 4/84 4/83 4/82 4/81 4/80 5/79 5/78	Exceeds Exceeds Exceeds Exceeds Meets Meets Exceeds Exceeds Exceeds Exceeds	Date of Promotion Unknown
Maria Blaz	ASIAN	Diploma 1950	NONE			NUC NUC NUC NUC NUC NUC NUC NUC NUC NUC NUC NUC	4/88 4/87 4/86 4/85 4/84 5/83 5/82 5/81 4/80 5/79 5/78	Exceeds Exceeds Exceeds Exceeds Exceeds Meets Exceeds Exceeds Exceeds Exceeds Exceeds	Date of Promotion Unknown
Barbara J. Dahill	WHITE	MSN, 1984 MA, 1981 BSN, 1975	NONE			NUC NUC NUC NUC NUC NUC	4/84 4/83 4/82 4/81 4/80 1/80	Exceeds Exceeds Exceeds Exceeds Exceeds Meets	Hired as NUC September 1979

PLAINTIFF'S EXHIBIT 165-G

COMPARATIVE CHART VIII

NAME	RACE	EDUCATION	Pre-NUC GWU Hospital Experience			Performance Evaluations			Promoted To, Or Hired As, NUC
			Position	Dates	Length (Years)	Position	Date	Overall Rating	
Madeline Cooper	BLACK	BSN, 1973	UNKNOWN			NUC	4/89	Exceeds	Date of Promotion Unknown
Margaret V. Herbert	WHITE	2 Year College	Started Positions Unknown Total	12/55	? ? ?	NUC NUC NUC NUC NUC NUC NUC NUC	5/87 5/86 5/84 5/83 5/82 5/81 4/80 4/79	Meets Meets Meets Meets Meets Meets Does not Meet Meets	Date of Promotion Unknown
Maureen Zutz	WHITE	Unknown	UNKNOWN			NUC NUC	4/87 4/86	Exceeds Exceeds	Date of Promotion Unknown
Margaret Thumm-Shorthill	WHITE	MSN, September 1978 BSN, April 1967	NEC Total	8/79 - 5/82	2.83 2.83	NUC NUC NUC NUC	5/83 4/82 4/81 12/79	Exceeds Exceeds Exceeds Meets	Promoted to NUC on 5/9/82
Daria Berizzo	WHITE	Masters, 1983 BSN, 1978	SN II ANC SN II SN I Total	10/83 - 4/85 11/79 - 9/83 7/79 - 5/80 1/79 - 6/79	1.58 3.92 0.92 0.50 6.92	NUC NUC SN II SN II ANC ANC ANC SN II SN I SN I	4/86 6/85 6/84 11/83 11/82 1/81 11/81 11/79 6/79 4/79	Meets Meets Exceeds Exceeds Exceeds Exceeds Exceeds Exceeds Exceeds Exceeds	Promoted to NUC on 5/5/85

PLAINTIFF'S EXHIBIT 145-H

COMPARATIVE CHART IX

NAME	RACE	EDUCATION	Pre-NUC GWU Hospital Experience			Performance Evaluations			Promoted To, Or Hired As, NUC
			Position	Dates	Length (Years)	Position	Date	Overall Rating	
Saundra Albrite (Exh. P94a-C, 105a-E)	WHITE	MSN, May 1979 BSN, May 1977	NONE			NUC NUC NUC NUC	5/84 4/83 4/82 4/81	Exceeds Exceeds Exceeds Meets	Hired as NUC on 4/7/80
Melinda McCartin (Exh. P75a-D)	WHITE	MSN, 1983 BSN, 1977	NONE			NUC	6/84	Meets	Hired as NUC on 2/13/84
Edna Hamilton (Exh. P93a-C, 101)	BLACK	MA (date unknown)	ANC Hired	?/? - 6/72 6/68		NUC NUC NUC NUC NUC NUC NUC	4/84 5/83 5/82 5/81 4/80 5/79 5/78	Meets Meets Meets Meets Meets Meets Meets	Promoted to NUC on 7/3/72
Patricia Kelley (Exh. P94a,F, 121, 181)	WHITE	MSN (date unknown) BSN (date unknown)	ANUC ANC SN II SN I	8/87 - 10/87 9/86 - 7/87 6/85 - 8/86 1/84 - 6/85 Total	.18 .92 1.25 1.50 3.84	NUC ANC	4/88 6/87	Exceeds Exceeds	Promoted to NUC on 9/?/87
Joseph J. Tomaino (Exh. 27A, 88A, 103A-D)	WHITE	MSN, 1987 BSN, 1981	NONE			NUC	4/87	Meets	Hired as NUC on 2/20/87
Tammy R. Sparks - Jenet (Exh. P99, 109)	WHITE	MA (Nursing), 1984 BSN, 1981	NONE			NUC	5/86	Meets	Hired as NUC on 11/4/85

PLAINTIFF'S EXHIBIT 165-I

COMPARATIVE CHART X

NAME	RACE	EDUCATION	Pre-NUC GWU Hospital Experience			Performance Evaluations			Promoted To, Or Hired As, NUC
			Position	Dates	Length (Years)	Position	Date	Overall Rating	
George A. Speese	WHITE	MSN, August 1987 BSN (date unknown)	NS ANC SN II SN I	7/85 - 12/86 6/81 - 6/85 10/80 - 5/81 6/79 - 9/80	1.50 4.08 0.67 1.33	NUC NUC NS NS NS NS	4/88 4/87 6/86 6/85 6/84 5/83	Exceeds Meets Exceeds Exceeds Exceeds Exceeds	Promoted to NUC on 12/28/86
				Total	7.58				
Mary Lou Wright	BLACK	MSN (date unknown)	CS	8/77 - ?/?	?	NUC NUC	5/88 4/87	Meets Meets	Date of Promotion Unknown
				Total	?				
Sandra Madison	BLACK	BSN (date unknown)	NONE			NUC NUC NUC NUC	5/89 4/88 5/87 5/86	Meets Meets Exceeds Meets	Hired as NUC on 9/9/85
Catherine Machinas	WHITE	BSN (date unknown)	ANC SN II SN I	3/74 - 6/74 ?/? - 3/74 1/72 - ?/?	0.25 ? ?	NUC NUC NUC NUC NUC NUC NUC NUC	4/89 12/88 4/87 5/86 4/85 4/84 5/82 5/81 5/79	Meets Does not Meet Meets Exceeds Meets Meets Meets Meets Meets	Promoted to NUC on 6/3/74
				Total	?				

COMPARATIVE CHART XI

NAME	RACE	EDUCATION	Pre-NUC GWU Hospital Experience			Performance Evaluations			Promoted To, Or Hired As, NUC
			Position	Dates	Length (Years)	Position	Date	Overall Rating	
Barbara Brown	WHITE	BSN (date unknown)	SN II	4/78 - 10/82	4.50	NUC	4/89	Exceeds	Promoted to NUC on 10/25/82
			SN I	12/75 - 3/78	2.33	NUC	4/88	Meets	
			ANC	9/74 - 11/75	1.25	NUC	5/87	Exceeds	
			SN II	1/74 - 8/74	0.67	NUC	4/86	Exceeds	
			SN I	11/72 - 1/74	1.25	NUC	4/85	Exceeds	
				Total	10.0	NUC	5/84	Exceeds	
						ANC	?	?	
						SN II	11/81	Exceeds	
						SN II	6/81	Exceeds	
Rose Erkenbeck	WHITE	Unknown	NUC	?	?	NUC	5/86	Exceeds	Date of Promotion Unknown
			?	1/3/61	?	NUC	5/85	Meets	
				Total	?	NUC	5/84	Meets	
						NUC	5/83	Meets	
						NUC	4/82	Meets	
						NUC	5/81	Meets	
						NUC	4/80	Meets	
Marilynn Archie	BLACK	AD, 1972	ANUC	10/80 - 3/82	1.33	NUC	4/87	Meets	Date of Promotion Unknown
			ANC	7/75 - 10/80	5.33	NUC	4/86	Exceeds	
			SN II	4/75 - 6/75	0.25	NUC	4/85	Exceeds	
			SN I	10/71 - 3/75	3.50	NUC	4/84	Exceeds	
				Total	10.41	NUC	4/83	Meets	
						NUC	7/82	Meets	
						NUC	4/82	Meets	

PLAINTIFF'S EXHIBIT 165-K

APPENDIX TO COMPARATIVE CHARTS

No file or information was provided or made available on the following NUC's:

NAME	RACE
P. BOLLINO	WHITE
P. CAPOBIANCO	WHITE
A. DEREMER	WHITE
M. GIVENS	WHITE
J. HEDITSIAN	WHITE
J. JOHNSON	WHITE
G. KOSER	WHITE
I. LIGHT	WHITE
M. MILLER	WHITE
G. PHELPS	WHITE
L. ROTHFIELD	WHITE
G.J. STAFFORD	WHITE
J. THOMPSON	WHITE
A. TRIVIGNO	WHITE
M.B. WALSH	WHITE

THE INTERVIEW PROCESS

INTERVIEW STRUCTURE	THE CANDIDATES		
	Deborah Quick Scales BLACK	Joan K. Michaels WHITE	Ann T. Cooley (Pierport) WHITE
	Dates of Interview: November 20, 21, 24 & 26, 1986	Date of Interview: November 10, 1986	Date of Interview: March 13, 1987
Interview by representatives from Nursing and Medical Center Administration (Director of Nursing, Physicians, Department Chairman)	Sheila McCarthy (white) - Director of Nursing Michael Tillman (white) - Associate Director Gaetano Molinari MD. (white) - Chairman, Neurology Dept. Gary Simon, MD. (white - Assoc. Chairman, Medicine	Sheila McCarthy (white) - Director of Nursing Michael Tillman (white) - Associate Director Gary Simon, MD. (white) - Associate Chairman, Medicine	Sheila McCarthy (white) - Director of Nursing Michael Tillman (white) - Associate Director Gary Simon, MD. (white) - Associate Chairman, Medicine
Interview by staff who have colleague relationship (Nursing Unit Coordinators, Nursing Education Coordinators, Administrative Coordinators)		*Lunch Group Interview By:* Daria Berizzi (white) - Nursing Unit Coordinator Mona Maxwell (white) - Nursing Education Coord. Diane Olechna (white) - Nursing Education Coord. Deborah Gallagher (white) - Administrative Coordinator	*Lunch Group Interview By:* Deborah Gallagher (white) - Administrative Coordinator Diane Olechna (white) - Nursing Eduction Coord. George Speese (white) - Nursing Unit Coordinator
Interview by employees to be supervised by the Nursing Unit Coordinator (staff nurses, Assistant Nurse Coordinators)	*Group Interview By:* Gina Brooks (black) - Staff Nurse II Pam Zurkowski (white) - Staff Nurse II Maureen Elliott (white) - Assistant Nurse Coordinator	*Group Interview By:* Maureen Elliott (white) - Assistant Nurse Coordinator Pam Zurkowski (white) - Staff Nurse II Gina Brooks (black) - Staff Nurse II	*Group Interview By:* Kathleen Vasquez (hispanic) - Nursing Education Coord. Vincent Walker (black) - Assistant Nurse Coordinator Lisa Hopkins, (white) - Staff Nurse I Maureen Elliott (white) - Assistant Nurse Coordinator Gina Brooks (black) - Staff Nurse II

PLAINTIFF'S EXHIBIT 164

302

REFERRAL MEMORANDUM

THE GEORGE WASHINGTON UNIVERSITY AND MEDICAL CENTER

PLAINTIFF'S EXHIBIT 9D

TO: MICHAEL TILLMAN, RN

DEPARTMENT: MED/SURG NURSING

APPLICANT'S NAME: Joan Michaels SSN:

POSITION REFERRED TO: NUC--ONCOLOGY (2E) MINIMUM SALARY: $30,067.28

Attachments: Application ___ References ___
Resume ✓ Test Results ___
Summary Sheet ___
Other ___

Theresa Everhart, RN — 4485 — 8/16/86
EMPLOYMENT SPECIALIST — EXTENSION — DATE

TO HIRE:

1. Enter proposed salary*: ___ Proposed starting Date: ___

*If the requested salary is higher than the minimum salary stated above, or if this would constitute a voluntary demotion or promotion of 2 or more grades, it will be necessary to complete the reverse of this form.

2. Sign and date below.

3. Please return these papers to the Employment Specialist (named above) as soon as possible to expedite any necessary approvals and the official offer of employment.

8/15 10 AM — Joan still has appl. — to mail to me. Later if I think she can take pt. told to call MT.

NOT SELECTED:

1. Was applicant interviewed by department? ☐ yes ☐ no
2. Position cancelled? ☐ yes ☐ no
3. Enter specific reason for non-selection:
   - ☐ does not possess job specific qualifications
     please identify ___
   - ☐ selected applicant with more relevant ___
     (please identify)
   - ☐ salary requirements too high
   - ☐ unsatisfactory references
   - ☐ applicant withdrew
4. Date and sign below, and return to the Employment Specialist (named above) as soon as possible.

DEPARTMENT REPRESENTATIVE — EXTENSION — DATE

REFERRAL MEMORANDUM

THE GEORGE WASHINGTON UNIVERSITY AND MEDICAL CENTER

PLAINTIFF'S EXHIBIT 98

537-4547

TO: MICHAEL TILLMAN, RN

DEPARTMENT: MED/SURG NURSING

APPLICANT'S NAME: Joan Michaels SSN:

POSITION REFERRED TO: NUC--ONCOLOGY (2E) S South MINIMUM SALARY: $30,067.20

Attachments: Application ____ ____ References ____
Resume ✓ Test Results ____
Summary Sheet ____
Other ____

Theresa Everhart, RN TE | 4485 | 8/6/86
EMPLOYMENT SPECIALIST | EXTENSION | DATE

TO HIRE:

1. Enter proposed salary*: ____ Proposed starting Date: ____

*If the requested salary is higher than the minimum salary stated above, or if this would constitute a voluntary demotion or promotion of 2 or more grades, it will be necessary to complete the reverse of this form.

2. Sign and date below.

3. Please return these papers to the Employment Specialist (named above) as soon as possible to expedite any necessary approvals and the official offer of employment.

NOT SELECTED: MADE OFFER FOR 5 South

1. Was applicant interviewed by department? ☑ yes ☐ no
2. Position cancelled? ☐ yes ☐ no
3. Enter specific reason for non-selection:
   - ☐ does not possess job specific qualifications please identify Does not possess clinical skills and expertise relevant to nursing
   - ☐ selected applicant with more relevant ____ (please identify)
   - ☐ salary requirements too high
   - ☐ unsatisfactory references
   - ☐ applicant withdrew
4. Date and sign below, and return to the Employment Specialist (named above) as soon as possible.

N. Tillman | 3694 | 9/3/86
DEPARTMENT REPRESENTATIVE | EXTENSION | DATE

Def. Exh. 37

PERSONNEL PSYCHOLOGY
1980, 33

THE FUTURE OF CRITERION-RELATED VALIDITY[1]

FRANK L. SCHMIDT
U.S. Office of Personnel Management
and
George Washington University

JOHN E. HUNTER
Michigan State University

As a result of rejection by personnel psychologists of the erroneous law of small numbers and of the adoption of correct inferential procedures, the future of criterion-related validity promises to be bright. Probable future developments include: (a) widespread appreciation of the low statistical power characteristic of small samples; (b) rejection of the traditional belief that validities are situationally specific; (c) widespread validity generalization based on new methods; (d) research demonstrations that rational estimates of validity are often superior in accuracy to empirical estimates; (e) widespread acceptance of research findings showing that single-group and differential validity by race are artifactual rather than substantive in origin and that test unfairness by race is a nonproblem; (f) increased application of decision-theoretic dollar utility analyses to selection programs; and (g) progress in the establishment of general principles and theories about trait-performance relations in the world of work.

FOR the last 50 years or so, personnel psychology, as a profession and a science, has been stunted and made sterile by the near-universal belief in the erroneous law of small numbers (Tversky and Kahneman, 1971). The law of small numbers holds that the law of large numbers applies to small numbers as well. The law of large numbers correctly states that large random samples will be highly representative of the population from which they are drawn. Those who erroneously assume that small samples will be similarly representative are

[1] The opinions expressed herein are those of the authors and do not necessarily reflect official policy of the Office of Personnel Management. Requests for reprints should be sent to Frank L. Schmidt, Personnel Research and Development Center, Office of Personnel Management, 1900 E Street, N.W., Washington, D.C. 20415.

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Journal of Applied Psychology
1978, Vol. 63, No. 4, 473-485

Def. Exh. 35

Statistical Power in Criterion-Related Validation Studies

Frank L. Schmidt
Personnel Research and Development Center, U.S. Civil Service Commission, Washington, D.C.

John E. Hunter
Michigan State University

Vern W. Urry
Personnel Research and Development Center, U.S. Civil Service Commission, Washington, D.C.

This study demonstrates that sample sizes required to produce adequate power in empirical validation studies are substantially larger than has typically been assumed. This finding leads to the conclusion that, from the viewpoint of sample-size requirements, criterion-related validity studies are "technically feasible" much less frequently than is commonly assumed. It is also shown that the "situational specificity" of employment test validities may be in large part a consequence of excessive faith in small-sample analyses, that is, belief in "the law of small numbers."

In a rather significant study a few years ago, Tversky and Kahneman (1971), using a questionnaire, posed the following problem to a group of psychologists attending an American Psychological Association convention:

> Suppose you have run an experiment on 20 subjects and have obtained a significant result which confirms your theory ($t = 2.23$, $p < .05$, two-tailed). You now have cause to run an additional group of 10 subjects. What do you think the probability is that the results will be significant, by a one-tailed test, separately for this group?

The median answer was .85. The actual probability is .473. The value obtained in the first study is the best estimate of the true size of the effect. This value lies 2.23 standard errors, (SEs) above zero when $N = 20$. If N is reduced to 10, the new SE becomes 1.414 times the original SE. This value then lies only 1.57 SEs above zero. To attain significance at the .05 level (one-tailed), it must lie 1.64 or more SEs above zero. In this distribution, only .473 of the values lie at or above 1.64.

The questionnaire contained a number of such problems, and in each case it was obvious that the psychologists grossly overestimated the power of statistical tests in small samples. No differences were found between mathematical and quantitative psychologists and others. Tversky and Kahneman (1971) conclude that most psychologists are believers in "the law of small numbers," which holds that the law of large numbers applies to small numbers as well. The law of large numbers does guarantee that very large random samples will be highly representative of the population from which they are drawn. Those who falsely assume that small samples will be similarly representative are endorsing the law of small numbers. The result is a gross overestimation of the amount of information contained in small samples and the correlated overestimation of the power of statistical tests to extract this "information."

What evidence is there for the existence of this error in industrial-organizational psychology? The assumption appears to be widespread, if not universal, that sample sizes from 30 to 50 are generally adequate for criterion-related validation studies. The June 1974 draft of the Equal Employment Opportunity Coordinating Council's Guidelines on Employee Selection Procedures (Note 1 Sec. 14a(4) iv) mentions sample sizes of 30 to 60 as adequate not only for validation studies, but also for differential validation studies by race. In a recent conference on employment procedures in state and local governments (Note 2), sample sizes from 30 to 50 were

Requests for reprints should be sent to Frank L. Schmidt, Personnel Research and Development Center, U. S. Civil Service Commission, Washington, D. C. 20415.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF HUMAN RESOURCES
WASHINGTON, D.C. 20001

7 MARCH 1977

PLAINTIFF'S
EXHIBIT
35F

Mr. Donald Novak
Administrator
George Washington University Medical Center
903 23rd Street, N.W.
Washington, D.C. 20037

Dear Mr. Novak:

This letter sets for the findings and recommendations of the State Survey Agency, following survey conducted at your facility on February 8, 9, 10, 1977. It is requested that you acknowledge, in writing, the receipt of this letter within twenty-one (21) days and submit an action plan with respect to the deficiencies and recommendations stated below.

Upon receipt of your response, a decision will be made regarding the facility's status of compliance with Title VI of the Civil Rights Act of 1964.

Summary of Findings and Recommendations

Dissemination of Information

The drafts for the new Patient Pre-admission Brochures, Patients Hand-Book, Visitors' Card and the Patients Hand-Book do not contain any nondiscriminatory statements relative to Title VI and Title VII of the Civil Rights Act of 1964. It is unknown if the draft for the Employee Hand-Book contains any reference to the aforementioned items.

Recommendation:

Nondiscriminatory statements have been developed by the Medical Center and should be included in any hand-book, pamphlet and brochure disseminate to patients, employees and the general public.

Thank you for your cooperation. Please call Mr. Harold K. Woolridge at 629-4225, if there are any questions.

Sincerely,

Jacqueline E. Johnson
Assistant Director
State Agency Affairs

ASSURANCE OF COMPLIANCE WITH THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE REGULATION UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

The George Washington University Hospital
(hereinafter called the "Applicant")
(Name of Applicant)

HEREBY AGREES THAT it will comply with Title Vi of the Civil Rights Act of 1964 (P.L. 88-352) and all requirements imposed by or pursuant to the Regulation of the Department of Health, Education, and Welfare (45 CFR Part 80) issued pursuant to that title, to the end that, in accordance with title VI of that Act and the Regulation, no person in the United States shall, on the grounds of race color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Applicant received Federal financial assistance from the Department; and HEREBY GIVES ASSURANCE THAT it will immediately take any measures necessary to effectuate this agreement.

If any real property or structure thereon is provided or improved with the aid of Federal financial assistance extended to the Applicant by the Department, this assurance shall obligate the Applicant, or in the case of any transfer of such property, any transferee, for the period during which the real property or structure is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. If any personal property is so provided, this assurance shall obligate the Applicant for the period during which it retains ownership or possession of the property. In all other cases, this assurance shall obligate the Applicant for the period during

which the Federal financial assistance is extended to it by the Department.

THIS ASSURANCE is given in consideration of and for the purpose of obtaining any and all Federal grants, loans, contracts, property, discounts or other Federal financial assistance extended after the date hereof to the Applicant by the Department, including installment payments after such date on account of applications for Federal assistance which were approved before such date. The Applicant recognizes and agrees that such Federal financial assistance will be extended in reliance on the representations and agreements made in this assurance, and that the United States shall have the right to seek judicial enforcement of this assurance. This assurance is binding on the Applicant, its successors, transferees, and assignees, and the person or persons whose signatures appear below are authorized to sign this assurance on behalf of the Applicant.

Dated January 21, 1977 George Washington University Hospital
(Applicant)

By: _____
S i g n e d
(President/Chairman of Board, or comparable authorized official)

901 23rd Street, N.W.
Washington, D.C. 20037
(Applicant's mailing address)

PLAINTIFF'S
EXHIBIT
35H

GEORGE WASHINGTON UNIVERSITY MEDICAL CENTER

POSITIONING FOCUS GROUPS

FINAL REPORT

Submitted To:

Ms. Peggy Molloy
Susan B. Davis Co.
1818 N Street NW
Washington, DC 20036

January 23, 1987

Market Dynamics, Inc.

present were making weekend plans, swearing, and joking around him. Other full-time and volunteer doctors made a variety of similar observations.

> "The housekeeping people who come in at Inopportune moments and the dietary service which drops a tray some feet from a patient who is totally helpless and needs to be fed. It takes forever for a nurse to come. It's not her job."
>
> "I hear ... the next staff level down ... secretaries, transporters [are] a lot less than desired. There's a lot less supervision. I'm not proud of them when families come in. They're noisy, embarrassing, and generally not paying attention to the poor guy sitting out there in the hallway ... tremendous problem."
>
> "...want to have an ambience where visitors come and feel cared for. Where people take pride... and make visitors feel comfortable. In some departments, patients are just sitting around; no one's talking to them. No one seems to care. The problem is the staff Is talking on the phone, reading the newspaper, or finishing up lunch."
>
> "They [the administration] should instill pride in ancillary people. They just grab their check and get out. Those people don't give a damn."
>
> **"We have an understructure of Black, underpaid workers who have a camaraderie among themselves, but who don't give a damn about the hospital institution as a whole. No effort is made to integrate these people. Racial separation on the basis of jobs is extremely strong."**

"Someone at the top has to take these ancillary people... they have to be taught some type of pride... the institution has lost pride. We're just employees. How can a physician instill pride?

Poor job performance of ancillary workers reportedly has resulted in lost revenue for the hospital, as well as a loss of good will among certain patients. However, lack of pride and resulting lack of commitment are not necessarily confined to support staff alone, as demonstrated by the following anecdote:

> "One woman. . . was a patient here with a severe case of hemorrhoids. She was told to take a bath. She had to use the bathroom in the hallway because there are few private baths. She told the nurse the bathtub was filthy and the nurse told the woman... who was going to pay a considerable sum per diem... told the patient 'in that closet right there, are sponges and detergent and you can clean it'. The patient said I will not and she checked out of the hospital against medical advice and

(3)

No. 94-1671

Supreme Court, U.S.
FILED
MAY 10 1995
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

DEBORAH QUICK SCALES,

Petitioner,

v.

THE GEORGE WASHINGTON UNIVERSITY,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF IN OPPOSITION

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May 1995

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43 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals sustaining the trial court's resolution of petitioner's legal claims conflicts with the decision in *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990).

2. Whether the trial judge violated 28 U.S.C. § 455(a) and the decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) by presiding over the trial.

3. Whether the petitioner was "fully heard" at trial within the meaning of Federal Rule of Civil Procedure 52(c).

PARTIES BELOW

The parties are correctly stated in the petition.*

*Respondent is unaware of any parent or subsidiary of the corporation that is a party to this proceeding.

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*Authorities upon which we chiefly rely are marked with asterisks.

No. 94-1671

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1994

DEBORAH QUICK SCALES,

Petitioner,

v.

THE GEORGE WASHINGTON UNIVERSITY,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW

Deborah Quick Scales, ("Scales"), filed suit against The George Washington University, ("GW" or "University"), on March 27, 1989, seeking declaratory and injunctive relief and $29 million in compensatory and punitive damages. Her complaint contained nine separate counts.

By Order dated March 25, 1991, the trial court granted partial summary judgment to the University and dismissed all of

Scales' claims except disparate treatment and retaliation[1] arising under Title VII.

By Order dated November 18, 1991,[2] the trial court reinstated the fraud claim,[3] but, after reexamining the merits of each, declined to reinstate any other claim dismissed in March. By Order dated August 21, 1992, the trial court, however, granted GW's renewed motion for partial summary judgment and dismissed Scales' fraud claim on the merits. Scales sought reconsideration again, but the trial court refused by its Order dated February 9, 1993, to reinstate the Title VII disparate impact claim, the 42 U.S.C. §1981 claims or the fraud claim.

On April 19, 1993, a bench trial, with an advisory jury

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[1] Although Scales requested the Court of Appeals to reverse and remand for new trial the district court judgment, she did not address her Title VII retaliation claim or attempt to show any error on the part of the trial court in dismissing that claim. Jul. 27th Sl. op. at 30-32.

[2] Petitioner's attempt at complying with Supreme Court Rule 33 has resulted in an Appendix that materially misstates and misquotes the trial court's rationale for its decisions. Rather than faithfully reproducing the district court memoranda, her Appendix contains text replete with errors ranging from misspellings and wrong citations to substantial omissions. As a blatant example that illustrates a very substantial omission, compare Petitioner's Appendix at 42, lines 2 and 3 -- where she has deleted almost two hundred words of text from Judge Oberdorfer's November 18, 1991, Memorandum -- with the Westlaw database at 1991 WL 257975 * 4 (D.D.C.).

[3] Since Scales' complaint alleged diversity of citizenship, her local claims were not pendant and the lower court thus lacked discretion to dismiss them. Confusion ensued on that issue because GW moved to dismiss the common law counts on the theory that they were pendant, Scales failed to raise diversity in her opposition and the district court did not refer *sua sponte* to Scales' complaint. *Cf.* Nov. 18th Sl. op. at 3-4. In a motion to reconsider the March 25th ruling, Scales finally raised the point with the trial court that she had asserted diversity jurisdiction in her complaint, and the judge acted accordingly.

impaneled,[4] commenced on the merits of Scales' Title VII disparate treatment and retaliation claims. At the close of Scales' case, the trial court granted GW's motion for judgment pursuant to Fed. R. Civ. P. 52(c). Scales appealed the district court's decisions on August 18, 1993. She sought summary reversal alleging for the first time that the trial judge had abused his discretion by not disqualifying himself pursuant to 28 U.S.C. § 455. After considering the issue raised for the first time on appeal, the motions panel of the D.C. Circuit denied the motion on January 4, 1994. The case was briefed, and then fully argued on November 14, 1994. Two weeks later, after determining that the issues Scales presented on appeal occasioned no need for an opinion, the Court Appeals affirmed, *per curiam*, on November 28, 1994, all of the orders and judgments of the district court. *Scales v. George Washington University*, 44 F.3d 1031, 1994 WL 709334 (D.C. Cir.). Scales then petitioned for rehearing and suggested rehearing *in banc*. By *per curiam* orders entered January 17, 1995, the Court of Appeals for the District of Columbia Circuit denied Scales' petition and suggestion. *Id.*

COUNTER STATEMENT OF THE CASE

In her "Statement of the Case," Scales points to an inadmissible hearsay statement that GW supposedly has "an understructure of black underpaid workers . . .," (Petition For Writ of Certiorari, ("Cert. Pet."), at 5), in a January 1987 Report, (Petitioner's Appendix, ("Pet. App."), pp. 311-313), that was admitted "not for the truth of the matter asserted, but to show [GW's] knowledge of the document," (Jul. 27th Sl. op. at 13 n.12), as evidence of possible pretext. Tr. dtd. Apr. 26th at 57-58. In fact, Scales' counsel conceded at trial that he was *not*

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[4] This Court had not yet ruled that provisions of the 1991 Civil Rights Act did not apply to cases that arose before its enactment, although the D.C. Circuit had in *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886 (D.C. Cir. 1992). The trial court dismissed the advisory jury after it had become hopelessly tainted by Dr. Work's incompetent "expert" testimony. Tr. dtd. Apr. 21st at 12-14.

offering the statement "as proof that [GW has] an understructure of black underpaid workers and that racial separation on the basis of jobs is extremely strong," (tr. dtd. Apr. 26th at 56), yet he is offering it for the truth to this Court.

The trial court properly credited uncontroverted testimony by University officials, (tr. dtd. Apr. 30th at 9-29 through 9-31), elicited by Scales, that GW "engaged in efforts to recruit blacks prior to the issuance of the 1987 report, [and] intensified its recruitment efforts after issuance of the report." Jul. 27th Sl. op. at 13 n.12. Indeed, GW's Director of Nursing testified to Scales' counsel's questions that after the report, GW intensified its earlier efforts by engaging a firm to bolster recruitment of black professionals (tr. dtd. Apr. 30th at 9-30 through 9-31), developing an advertising campaign to increase GW's visibility at historically black colleges, (*id.* at 9-31), advertising on black radio, reworking its nursing brochure, and consulting with black nurses on how better to recruit their colleagues. *Id.*

Scales conveniently omits the significant fact that for ten years an *African American* held the Head Nurse job to which Scales claims she is entitled.[5] *Cf.* Cert. Pet. at 2. Not only does this fact eviscerate Scales' bald contention that GW "segregates jobs on racial lines" in a "work force structure [of] 'white top and minority (black) bottom'" (Cert. Pet. at 4), but it belies Scales' claim that race factored anywhere in the promotion denial.

On December 11, 1986, Joan Michaels, ("Michaels"), was

---

[5] In 1985, a Nursing Unit Coordinator ("NUC") job became vacant in GW's acute medicine unit known as "5-South," upon the departure of Edna Hamilton, the African American female incumbent who held that position for a decade. Jul. 27th Sl. op. at 3. That position was equivalent to Head Nurse for a unit of the hospital.

offered the NUC position for 5-South.[6] Jul. 27th Sl. op. at 4, 6. Michaels was the best qualified candidate. *Id.* at 6. Scales fails to state that Michaels was one semester short of obtaining her Master of Science in Nursing ("M.S.N.") degree, and she had been a Head Nurse at Sibley Memorial Hospital for three years. *Id.* at 5-6. She also received "rave reviews" from her interviewers, who considered her "dynamite." *Id.* at 5. Scales, on the other hand, had not been admitted into an M.S.N. program and had not received any credits toward the Master's degree.[7] *Id.* at 5. Although she had been an Assistant Nurse Coordinator, ("ANC"), for almost 5 years, Scales had served as Acting NUC for only a few weeks. *Id.* at 4. Finally, Scales' interviewers were "lukewarm" about her interview performance.[8] *Id.* at 5. Michaels, however, declined the position in mid-January 1987. *Id.* at 6.

The vacancy was readvertised in early 1987 due to: (1) GW's desire to consider more than one qualified applicant; (2) GW's belief that the candidate selected to become NUC for 5-South must perform well in the interview, and demonstrate effective communication skills; and (3) GW's concern, after observing Scales' performance as Acting NUC, that her

---

[6] Scales' claim of preselection is wholly unfounded. Cert. Pet. at 2. The trial court after objection, properly struck from the record as impermissible hearsay, Gina Brooks' statement "that Michaels told her during her interview that she (Michaels) had been offered the position of NUC for 5-South." Jul. 27th Sl. Op. at 6 n.5 and 29 n.20. Notably, Scales did not deny that the purported out-of-court statement was offered for the truth; she did not point to any exception to the hearsay rule that might arguably cure the hearsay taint; and, Scales did not assert that the trial court erred by sustaining GW's objection. Tr. dtd. Apr. 30th at 12.

[7] Scales' reference to having obtained the M.S.N. degree in 1991, (Cert. Pet. at 1), is completely irrelevant to this case except perhaps as a concession that the M.S.N. degree is an important credential for the head nurse job.

[8] The trial court correctly dismissed as "unreliable as well as irrelevant," Scales' *ipse dixit* "assertion that she performed very well during her interviews." Jul. 27th Sl. op. at 5 n.4.

communication skills were less than they should be, as Head Nurse of the largest and most challenging nursing unit in the University's Medical Center. Jul. 27th Sl. op. at 6-7.

In April 1987, Ann Cooley Pierpont, ("Cooley"), was offered the NUC position for 5-South. Jul. 27th Sl. op. at 9. Again, GW selected the best qualified candidate. *Id.* at 9. Scales fails to mention that Cooley had been awarded the M.S.N. degree in nursing administration, and had also obtained a medical-surgical certification that Scales did not have. *Id.* at 8. Moreover, Cooley had been a Head Nurse at the National Rehabilitation Hospital ("NRH") for the past two years, in addition to having held an ANC position at GW several years earlier. *Id.* Cooley even started a new nursing unit at NRH. *Id.* Additionally, Cooley had been recommended by all of those who had interviewed her on March 13, 1987, except one. *Id.* GW considered Cooley's interview performance to be substantially superior to Scales'. *Id.* In addition to Cooley's superior education, experience and interview performance, GW considered Scales' four-month performance as Acting NUC for 5-South to be less than fully satisfactory. *Id.* at 8-9. Cooley began working on May 19, 1987, as the new NUC for 5-South. *Id.* at 10.

REASONS FOR DENYING THE WRIT

A. THE DISTRICT COURT'S DECISION TO AWARD JUDGMENT PURSUANT TO FED. R. CIV. P. 52(c) IN FAVOR OF THE UNIVERSITY WAS UNQUESTIONABLY CORRECT.

Summary of Argument

In the context of this record, which conclusively shows that petitioner was undermined by her own misguided trial tactics, the very uniqueness of this case, turning as it does on its own special facts, precludes review by this Court.

At trial, Scales was given a full and fair opportunity to present all relevant evidence and arguments to the district court. After hearing all of her case, the district court reasoned that Scales had "adduced evidence from the direct and cross-examination of witnesses who she called that supports [the University's] position that the reasons were not pretextual, but were legitimate and nondiscriminatory." Jul. 27th Sl. op. at 19 and 24-25. Given that Scales advanced GW's legitimate, non-discriminatory explanation by calling and questioning GW officials as hostile witnesses in her case, then tried to prove it pretextual, but "[t]he district court did not find [Scales] rebuttal persuasive, and [Scales] did not suggest that [s]he had further evidence on point," *Mitchell v. Baldrige*, 759 F.2d 80, 88 (D.C. Cir. 1985), the district court quite properly "decide[d] the ultimate question: whether plaintiff has proven 'that the defendant intentionally discriminated against [her]' because of [her race]." (Citation omitted). *St. Mary's Honor Center v. Hicks*, ____ U.S. ____, 113 S.Ct. 2742, 2749 (1993) (Scales had to prove "*both* that [GW's] reason was false, *and* that discrimination was the real reason," *id.*, 113 S.Ct. at 2752).

The district court also properly concluded that Scales' statistical evidence and her statistical expert were utterly incompetent.

1. Scales' Assertion That She Was Not "Fully Heard" Is Unfounded.

Scales claimed, for the first time on appeal,[9] that because the trial judge remarked that he "probably wouldn't grant [GW's Rule 52(c)] motion anyway," (tr. dtd. Apr. 22nd at 93), her right to be fully heard was substantially compromised. Cert. Pet. at 12,

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[9] Arguments not made below are deemed waived, *N.L.R.B. v. Sears Roebuck & Co.*, 421 U.S. 132, 163-164 (1975), and, absent "exceptional circumstances" not present here, "it is not [the Court of Appeals] practice to entertain issues first raised on appeal." *Roosevelt v. E.I. DuPont de Nemours & Co.*, 958 F.2d 416, 419 & n.5 (D.C. Cir. 1992).

60. In the district court, however, Scales was so satisfied that she had carried her ultimate burden of proving intentional discrimination and retaliation at the close of *her* case that she orally "move[d] for judgment on the record on both counts in [her favor]," (tr. dtd. May 5th at 12-89), and reaffirmed her dubious demand for judgment in proposed findings of fact and conclusions of law filed with the trial court.

Now Scales contends that because of the judge's remark, she "completely restrategized and restructured her case-in-chief" by reserving "[k]ey witnesses" for rebuttal and "refashion[ing]" her interrogation of "hostile witnesses" during her case-in-chief. Cert. Pet. at 12, 60. Scales' assertion is entirely disingenuous, since she finished examining GW's principal decisionmaker *before* the colloquy. Moreover, her "risky," (Jul. 27th Sl. op. at 24 n.15), case strategy was unaltered from the beginning. As the trial court noted,

> [p]laintiff chose to proceed by calling the decisionmakers in her case-in-chief and eliciting from them the reasons for the disputed decisions. Thus, [GW's] legitimate nondiscriminatory reasons for the decisions were presented during *plaintiff's* case. Plaintiff then attempted, in her case, to show that those reasons were pretextual.

July 27th Sl. op. at 24.

Deliberately, Scales persisted in that fashion from the very beginning "despite strong urging by the Court during two pretrial conferences that the trial should proceed in the order established by *McDonnell Douglas's* indirect method of proof." *Id.* at 24 n.15. Throughout the trial, the Court continued to caution Scales about putting GW's reasons for its decisions on the record in her

case.[10] For instance, Scales understood that GW's Director of Nursing was "a hostile witness" and would offer reasons for rejecting Scales, (tr. dtd. Apr. 26th at 64), yet she insisted on calling the GW official despite the trial judge's contrary urging.

> It would be so much better if you [GW] put her [GW official] on with her explanation and then you [Scales] cross-examine her. I have told you [Scales] that forty times. But you [Scales] are going to put her on.

Tr. dtd. Apr. 26th at 65. The trial judge went on to counsel that, "[t]he burden the plaintiff has is to produce evidence. It's not to force confessions from hostile witnesses." Tr. dtd. Apr. 29th at 35.

But Scales was undeterred, and predictably "the witnesses did not confess to discrimination on the basis of race, nor did they make any material contradictions." Jul. 27th Sl. op. at 24 n.15. As those hostile witnesses, in responding to Scales' interrogation, proceeded to "explain their nondiscriminatory reasons for not selecting [Scales] for the NUC position," (*id.*), the trial judge continued to urge caution: "why do you [Scales] want to torpedo whatever evidence you have?" Tr. dtd. Apr. 29th at 26. As Scales tried to refresh a GW official's recollection on a point, for example, the trial court interceded and inquired,

> [n]ow, why do you want to prove that [Scales was insensitive to subordinates]? That's very damaging. * * * What are you trying to do? *

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[10] In colloquy with the court, Scales' counsel acknowledged that by continuing to question GW's Nursing Director, "she might probably provide an explanation" for her decisions. The court responded: "Well why do you care what her explanation is? You don't expect her to say that it's racially motivated, do you?" Counsel answered "no," (tr. dtd. Apr. 29th at 97), then proceeded with his interrogation to elicit testimony from GW officials "relevant to the ultimate issue." *Id.* at 98.

> * * Why do you want to dig up from [the Nursing Director's] memory a derogatory observation about [Scales]?

Tr. dtd. Apr. 29th at 29-30. Scales ignored the trial court's repeated suggestions and advice and insisted on putting all of GW's explanations on the record. Tr. dtd. Apr. 30th at 13.

Without a doubt, Scales was aware of precisely what GW's nondiscriminatory reasons were beforehand. They were never kept "secret." Jul. 27th Sl. op. at 25 n.17. All of those reasons had been previously disclosed to Scales in discovery and during motions practice. Scales surely anticipated that they would be advanced when she called hostile witnesses, and the testimony was as expected. Even before Scales accomplished what she set out to do in that regard, she acknowledged:

> We have the burden of proving pretext. We view that the reasons given for the denial of promotion for Scales are pretextual. . . .

Tr. dtd. Apr. 26th at 63. Accordingly, as the trial proceeded, the judge deliberately undertook "to make sure that the record included whatever it is that [Scales] thinks [is] evidence [of] pretext." *Id.* at 57-58. And Scales has conceded that she "'offered her evidence of pretext during her case in chief.'" Jul. 27th Sl. op. at 24 n.15, *citing* Scales' proposed findings and conclusions at 39. Thus, Scales' claim that she left room for discrediting those officials during their expected testimony for the defendant, (Cert. Pet. at 60), rings exceedingly hollow, as does her argument that by granting GW's motion after saying he "probably wouldn't," (*id.*), the trial judge somehow abused his discretion.

"It is clear from the cases that a Rule [52(c)] denial is tentative and does not constrain the court's ultimate disposition of the case." *Sanders v. General Services Admin.*, 707 F.2d 969, 972 (7th Cir. 1983). Courts have approved the granting of such

motions at the close of a "'full blown' trial," and even upon reconsideration "sometime between the end of plaintiff's case and the end of the trial," after being initially denied. *Id.* (citations omitted).

> If plaintiff has not set forth evidence of discrimination and there is nothing aside from general assertions of discrimination for defendant to rebut, no purpose is served by requiring defendant to go through the motions -- at no small cost in time and expense to the parties and the court. Plaintiff has no entitlement to a full dress trial regardless of the plausibility of her claim.
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> * * *
>
> If we refused to allow reconsiderations . . . we would be denying the district court an element of its discretion to handle cases as it thinks best.

Id. at 973. In this case, Scales' "nonselection was because she was less qualified than the other applicants." Jul. 27th Sl. op. at 26 n.17. The trial judge's plainly tentative comment about what he would "probably" do "does not constrain the court's ultimate disposition of the case" any more than had GW's motion actually been denied, and then granted later. *Sanders v. General Services Admin.*, 707 F.2d at 972-973.

This Court should thus disregard Scales' attempt to focus blame elsewhere for her failed trial strategy, particularly since she had the opportunity to move to reopen the case under Fed. R. Civ. P. 60(b) if she sincerely felt her case of pretext remained undeveloped, but failed to do so. *Cf. Mitchell v. Baldrige*, 759 F.2d at 89 (because "plaintiff asked to reopen his case-in-chief so that he could rebut the nondiscriminatory explanation . . . [and] the district court" denied the request, the case was remanded).

2. Scales Is Mistaken In Stating That The Trial Court Relied On GW's Witness In Its Ruling.

Scales next maintains that the district court relied on the testimony of Dr. Saberhagen, GW's statistical expert, taken "out-of-turn,"[11] to rebut her statistical expert. Cert. Pet. at 62-63.

The trial court in this case purposefully isolated any testimony of witnesses called out-of-turn by GW in accordance with Scales' stipulation "that by isolating defendant's direct exam, it is without prejudice to defendant's motion for judgment at the completion of plaintiff's case." Tr. dtd. Apr. 29th at 133-134.

Moreover, the trial judge is knowledgeable of statistical principles in his own right, as evidenced by the following colloquy with counsel for GW:

> *Counsel*: I do not know how [much] understanding your honor [has of statistics].
> *Court*. It's considerable. I haven't been here for 15 years and in private practice for 45 for nothing.
> *Counsel*: Your Honor, I've taken statistics and I'm still very much in the dark.
> *Court*: Well, I'm not in the dark.

Tr. dtd. Apr. 22nd at 92. In pointing out the failings and "deficiencies in Dr. Work's analysis," the trial court relied on its own considerable understanding of statistical principles to conclude that there was no "uniform pool of data," that the "sample size

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[11] Scales admits that she "agreed[] to have . . . defense experts testify out-of-turn during her case in chief." Cert. Pet. at 11.

[was] too small to yield scientifically reliable conclusions,"[12] and that there were other substantial analytical defects, as well as the authority of "scholarly publications" of which it properly took judicial notice. Jul. 27th Sl. op. at 27 n.18. There is simply "no reason to question the judge's assertion." *Sanders v. General Services Admin.*, 707 F.2d at 973.

3. The Trial Court Properly Rejected Scales' Statistical Evidence.

Scales sought to introduce statistical evidence "intended to demonstrate a racial imbalance" in GW's Hospital workforce. Jul. 27th Sl. op. at 16. However, Scales' statistical evidence regarding the racial composition of the Hospital's entire workforce failed because "only individuals with the *relevant qualifications* may provide the basis for a comparison that is probative of discrimination," among other reasons. *Id.* at 17. *Cf. Wards Cove Packing Co. Inc. v. Atonio*, 490 U.S. 642, 651-652 (1989) (finding it "nonsensical" to measure "alleged discrimination in the selection of accountants, managers, boat captains, electricians, doctors, and engineers . . . by comparing" minority representation in unskilled cannery positions); *Hammon v. Barry*, 813 F.2d 412, 427 n.31 (D.C. Cir. 1987) *citing Hazelwood School District v. United States*, 433 U.S. 299, 308 n.13 (1977)("when the job qualifications involved are ones that relatively few possess, statistical presentations that fail to focus on those qualifications do not have significant probative value").

Since Dr. Work admitted, *inter alia*,: (1) that to be a staff nurse at GW, the RN license is required, (tr. dtd. Apr. 20th at 70); (2) but that he included for comparative purposes, people in

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[12] Tiny sample size is an obvious defect. *Cf. International Bro. of Teamsters v. United States*, 431 U.S. 324, 340-341 n.20 (1977) ("Considerations such as small sample size may, of course, detract from the value" of statistical evidence); *Birbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 511 (4th Cir. 1994)("plaintiff's data. . .simply involved too small a sample size to have any probative value here").

positions that did not have the RN job requirement, (*id.* at 70-71); and (3) that he was not aware of whether people who were represented in his analysis were qualified to be NUC's, or whether the M.S.N. credential was beneficial for those in Hospital management positions, (*id.* at 81),[13] the trial court concluded that Scales simply "failed to show that employees at higher and lower levels in the employment hierarchy possessed qualifications and experience sufficiently similar to the NUC position to justify comparison." Jul. 27th Sl. op. at 17. Scales' comparison of jobs that "do not require an RN licensure requirement [ ] with positions that do require an RN license is not a relevant comparison." *Id.* The trial court was unquestionably right.

Dr. Work erred again by merging "data for the period 1981 through 1989, rather than focusing on the specific period in question, [*viz.*,] December 1986 through March 1987," (Jul. 27th Sl. op. at 16), and even then, Dr. Work did not know whether minority representation in NUC positions improved during the 1981 through 1989 period he arbitrarily selected. Tr. dtd. Apr. 20th at 80. Tellingly, "individuals were counted multiple times if they held different positions during the surveyed period, further tending to skew the results." Jul. 27th Sl. op. at 17. When asked why he did not correct that defect, Dr. Work conceded, "because that didn't -- it doesn't inter[pret] the picture that we wanted to establish at all."[14] Tr. dtd. Apr. 20th at 78.

Finally, the district court found that Dr. Work used improper population statistics, (*cf. Hammon v. Barry*, 826 F.2d 73, 77 (D.C. Cir. 1987) *reh'g granted in part, en banc*, 833 F.2d 367 (1987), *reh'g vacated* 841 F.2d 426 (1988), *cert. denied*, 486

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[13] At one point, even Dr. Work discredited Scales' counsel's continued belief that an M.S.N. degree is not an appropriate requirement for NUC, by stating "I would not conclude that[,] Mr. Mekbib." Tr. dtd. Apr. 21st at 29.

[14] In straining to arrive at a desired statistical outcome, Dr. Work even included in his comparative analysis the plainly irrelevant fact that Scales obtained an M.S.N. degree in 1991. Tr. dtd. Apr. 20th at 59-60.

U.S. 1038 (1988) (relevant labor market is Washington metropolitan area, not confines of D.C.)), and had misused statistical data and thus deemed his testimony to be hopelessly flawed and incompetent. In short, Dr. Work's analysis was found to be wholly "inaccurate and without genuine probative value." Jul. 27th Sl. op. at 27. The district court concluded that there was no reliable evidence that GW's workforce was intentionally segregated on the basis of race. *Id.* at 13. Despite Scales' attempt to offer reasons for the collapse of this statistical evidence other than its failure to account, *inter alia*, for the requirements of *Hammon v. Barry*, the plain fact remains that Scales voluntarily "withdrew it" from consideration. Jul. 27th sl. op. at 16.

B. THE DISTRICT COURT'S GRANT OF PARTIAL SUMMARY JUDGMENT EARLY IN THE LITIGATION WAS PLAINLY APPROPRIATE AND DOES NOT IMPLICATE *LYTLE V. HOUSEHOLD MANUFACTURING, INC.*, MUCH LESS CONFLICT WITH IT.

Summary of Argument

The question petitioner first presents is not sufficiently vital for this Court to entertain given that the Civil Rights Act of 1991 provides a *new* right to jury trial in Title VII actions, a right that Scales did not have, thereby eliminating in subsequent cases the law/equity dichotomy she raises. *Cf.* fn. 4, *supra*.

Moreover, Scales failed to timely raise the issue. In her petition for rehearing to the Court of Appeals, Scales claimed for the first time that the trial court's dismissal of her §1981 claims violated her constitutional right to a jury trial under the reasoning of *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990). She has thus waived that argument.

Even if she had preserved the argument, the *Lytle* case is inapposite. The reasoning and conclusions of the Court of

Appeals are consistent with harmless error, *not* collateral estoppel. Given the way Scales tried her case, the district court would have directed a verdict in GW's favor on the §1981 claims at the close of her case.

Scales' "suites (sic) at common law," (Cert. Pet. at 19), also lack merit. She failed to advance evidence to sustain essential elements of her fraud claim and even admitted a lack of reliance on GW's supposed representations. The intentional infliction of emotional distress claim was filed too late and GW's actions were not, as a matter of law, "outrageous" or "extreme." Finally, her inability to show discrimination eliminated any possibility of success on her contract claim. In any case, her failure to adduce any contract from which she could benefit left Scales an "at will" employee.

1. Scales' Seventh Amendment Argument Was Not Timely Presented And Is Deemed Waived.

Arguments not timely presented are deemed waived. *See, e.g., Roosevelt v. E.I. DuPont de Nemours & Co.*, 958 F.2d at 419 & n.5. Even rights under the Federal Constitution may be waived by failure to assert such errors on appeal. *Cf. Frank v. Mangun*, 237 U.S. 309, 342-343 (1914). This general doctrine of waiver applies to arguments raised for the first time in a petition for rehearing. *United States v. Lewis*, 798 F.2d 1250 (9th Cir. 1986)(order amending opinion published at 787 F.2d 1318 (9th Cir. 1986), and denying petition for rehearing and rehearing *en banc), cert. denied*, 489 U.S. 1032; *Com. of Northern Mariana Islands v. Lizama*, 27 F.3d 444, 448 (9th Cir. 1994); *United States v. Fogelman*, 592 F.2d 786, 787 (5th Cir. 1979).

In her petition for rehearing in the Court of Appeals, Scales asserted for the first time that the district court's resolution of her discrimination claims "infringes upon her rights preserved by the Federal Constitution's Seventh Amendment and is in conflict with . . . a unanimous decision of the U.S. Supreme

Court."[15] Because she failed to raise this question in her appellate brief or at oral argument,[16] this Court should decline to address it.

In any case, the court below affirmed the district court's decisions on grounds other than a purported collateral estoppel effect of the Title VII judgment. After being fully heard, Scales simply failed to "establish discrimination in her Title VII claim [and s]he therefore could not have succeeded on her [§]1981 claim [or her contract claim]." *Scales*, 44 F.3d 1031, 1994 WL 709334 ** 1. Given the state of her record evidence, the trial court could not, as a matter of law, have submitted the case to a jury; it would have ordered judgment as a matter of law against Scales, just as it did. *Lytle v. Household Manufacturing, Inc.*, is thus inapposite.

2. The Trial Court Was Correct To Dismiss Scales' §1981 Claims.

Scales' §1981 claim is predicated on alleged disparate treatment, which necessitates a showing of intentional discrimination. *See Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 69 (6th Cir. 1985) ("It is well settled that an action based upon 42 U.S.C. §1981 requires the plaintiff to demonstrate that the defendant[] intentionally discriminated against her on the basis of race").

U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983), provides that in a Title VII case, when a plaintiff invokes a rebuttable presumption of racial discrimination by making out a *prima facie* case, and the employer articulates

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[15] Scales' constitutional argument relative to dismissal of her common law claims appears for the first time in her petition to this Court.

[16] Scales admits that "[i]n her briefs and oral argument, [she] urged the Court below to reverse the summary dismissals of her Section 1981 and common law claims [only] because the[y] [purportedly] . . . violate the mandates of F. R. Civ. P. Rule 56." Cert. Pet. at 16.

legitimate non-discriminatory reasons for its challenged conduct, the rebuttable presumption drops out and the district court proceeds to resolve "the ultimate factual issue in the case . . . '[whether] the defendant intentionally discriminated against the plaintiff.'" *Id.* at 715, *quoting Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Once a Title VII case proceeds to this state, as Scales' case did in her case-in-chief, the Title VII inquiry is thus no different than that required under §1981. Indeed, so duplicative are these claims that even Scales' counsel allowed as how he believed the jury had been impaneled to hear his §1981 claim. Tr. dtd. Apr. 21st at 13-14.[17] In short, the ultimate issue in an employment discrimination case decided under either statute "is always whether the defendant intentionally discriminated against the plaintiff." *McDowell v. Safeway Stores, Inc.*, 753 F.2d 716, 718 (8th Cir. 1985).

Here the district court weighed *all* Scales' trial evidence, including all her evidence of pretext in the context of GW's explanation for its actions, and concluded, after exhaustive explication, that GW did not discriminate against Scales, (Jul. 27th Sl. op. at 30), and did not retaliate against her either. Id. at 32. Had "Scales been allowed to present [her §1981] claims before a jury, the district court would properly have ordered judgment as a matter of law against her," *Sailor v. Hubbell, Inc.*, 4 F.3d 323, 326 (4th Cir. 1993), since to succeed she would have had to make the same showing in support of her §1981 claims as her Title VII claims. In view of Scales' failure to demonstrate that the University's proffered reasons for its allegedly racially discriminatory conduct were a pretext for intentional discrimination, her §1981 claim must fail, as her Title VII claim necessarily did. Any error with respect to the dismissal of Scales' §1981 claim would thus be harmless. *See Hussein v. Oshkosh Motor Truck Company*, 816 F.2d 348, 354 n.6 (7th Cir. 1987); *Roscello v. Southwest Airlines Co.*, 726 F.2d 217, 221-222 (5th Cir. 1984); *Johnson v. Wolff's Clothiers, Inc.*, 663 F.2d 800, 804

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[17] Scales' §1981 claims had been dismissed more than two years earlier, on March 25, 1991.

(8th Cir. 1981).

In any case, the district court acted appropriately on the merits in dismissing her §1981 claim due to Scales' failure to demonstrate that a change from ANC to NUC overcame the hurdle established by *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

Scales' "expert," (Cert. Pet. at 28-30), was wholly unqualified to testify as a nursing expert by his own admission. *Cf.* Tr. dtd. Apr. 20th at 54; *see, also*, Work Dep. at 187-188, 260-261. Moreover, the belated affidavit of Dr. Work,[18] whose "expertise" is not nursing, but only "on the racial composition of [GW's] workplace and how that composition came about," (Jul. 27th Sl. op. at 15), suggests at most that a change from ANC to NUC would be a promotion. It did not establish nor could it, that such a change would constitute the requisite "new and distinct relation" with GW. *See Byrd v. Pyle*, 728 F.Supp. 1 (D.D.C. 1989) (Richey, J.)("virtually all promotions involve enhanced responsibilities and increased pay" and not all are sufficiently significant). *See also, Wall v. Trust Co. of Georgia*, 946 F.2d 805 (11th Cir. 1991) (denying relief under *Patterson* for nonpromotion from customer service representative to tax analyst); *Bennun v. Rutgers State Univ.*, 941 F.2d 154 (3rd Cir. 1991)(denying relief for nonpromotion from tenured associate professor to full professor based on application of *Patterson*); *Harrison v. Associates Corp. of North America*, 917 F.2d 195, 198 (5th Cir. 1990)(change from computer operator to lead computer operator does not satisfy the *Patterson* test). Ironically, even Scales' counsel seems to have accepted at trial GW's contention that "the [ANC] effectively does everything that the NUC does." Tr. dtd. Apr. 29th at 84-86.

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[18] Scales filed an *untimely* "supplemental opposition" to GW's motion for partial summary judgment in an effort to introduce Dr. Work's affidavit. The trial court, in an exercise of its sound discretion, disregarded it and the purported "expert testimony of Dr. Work."

Finally, after "[e]valuating the evidence adduced in the light most favorable to [Scales],. . . the record [could not] support a presumption of intent to discriminate," as it must for the Court of Appeals to have considered disturbing the district court's grant of summary judgment. *Clifton Terrace Assoc. v. United Technologies*, 929 F.2d 714, 722 (D.C. Cir. 1991). Even if the Court of Appeals "were to [have] conclude[d] that [Scales] established a *prima facie* case. . . the evidence presented in support of [her] claim of discrimination is consistent with [GW's] proffered reasons" for not promoting her. *Id. Cf.* Jul. 27th Sl. op. at 30 ("she [Scales] adduced evidence supporting [GW's] position that its reasons were legitimate and non-discriminatory"). And, in any event, Scales failed to show that GW's reasons for refusing to promote were pretextual. *Theard v. Glaxo, Inc.*, 47 F.3d 676, 680 (4th Cir. 1995). *Cf.* Jul. 27th Sl. op. at 30 (Scales "has failed to offer evidence sufficient to show that [GW's] nondiscriminatory reasons for its employment decisions are unworthy of credence, or that those decisions were racially motivated").

3. Dismissal of Scales' Claim of Fraud Was Clearly Warranted.

GW carried its burden of demonstrating that Scales failed to make a showing sufficient to establish the existence of an element essential to her claim of fraud. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986) ("[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.*, 477 U.S. at 323). *See, also, Frito-Lay, Inc.*, 863 F.2d 1029, 1032 (D.C. Cir. 1988).

The gravamen of Scales' claim is that GW falsely represented itself as an EEO/AA employer verbally and in writing resulting in her loss of career advancement. To sustain that claim, Scales had to prove by clear and convincing evidence each of five essential elements: (1) a false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) with intent to deceive, and (5) action taken in reliance on the

representation. *Bennett v. Kiggins*, 377 A.2d 57, 59 (D.C. 1977), *cert. denied*, 434 U.S. 1034 (1978). The district court properly concluded that Scales failed to show that GW's representation of being an equal opportunity employer was made with knowledge of its falsity or with the intent to deceive, or that the representation was material or relied upon by Scales.

In that last regard, Scales testified at deposition to her understanding[19] that "as a black staff nurse [she] would have to . . . work twice as hard . . . and it was a big problem," (Scales' Dep. at 156) and "that because [she was] black, [she] would have to work harder if [she] wanted a promotion, [she] would have to exceed in [her] evaluation, [she] would have to excel in [her] performance in order to get promotions, or what have you." *Id.* at 57. *Cf.* Aug. 21st Sl. op. at 4-5. Naturally, absent reliance, Scales' fraud claim collapses. *See Hercules & Co. v. Shama Restaurant Corp.*, 566 A.2d 31, 39 n.16 (D.C. App. 1989).

The gist of Scales' challenge to the lower court's ruling is the contention that she contradicted her own admissions at deposition by subsequent affidavits filed not in opposition to GW's motion but in a motion by Scales for reconsideration. Feb. 9th Sl. op. at 5-6. It is well settled that "sham" attempts to contradict deposition testimony by subsequent affidavits cannot create a genuine issue of fact. *Pyramid Securities Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1123 (D.C. Cir. 1991). *See, also, Mack v. United States*, 814 F.2d 120, 124 (2nd Cir. 1987)("a party's affidavit which contradicts his own prior deposition testimony should be disregarded on a motion for summary judgment"); *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984)(same). As the district court observed, the subsequent affidavits confirm a "belief that discrimination is ubiquitous in our

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[19] Scales' understanding was derived from conversations with her supervisor, Edna Hamilton, (also African American), who was the NUC for 5-South from 1974 through 1984. Scales' Dep. at 20-21. Therefore by "July of 1984, Plaintiff was not acting or forebearing in reliance on [GW's EEO] assertions." Aug. 21st Sl. op. at 4-5.

society which tends to undermine an assertion [of] reliance on GW's EEO representation." Feb. 9th Sl. op. at 6. Since Scales continued to admit that she really did not rely on GW's EEO representation, her fraud claim simply could not be sustained.

4. Scales' Claim of Intentional Infliction of Emotional Distress Was Properly Dismissed As Time-Barred and Unfounded.

The District of Columbia Court of Appeals has held that where a claim for emotional distress is completely intertwined with another claim, the appropriate statute of limitation is that set for the underlying local claim. *Saunders v. Nemati*, 580 A.2d 660, 665-667 (D.C. App. 1990). Although Scales maintains that her emotional distress claim either stands alone as an independent action, or is completely intertwined with her "underlying" fraud claim, it plainly stems from her contention that GW denied her promotion from ANC to NUC in December 1986 and March 1987 because of her race, which forms the actual basis of all the claims she has made.[20] It cannot be gainsaid that Scales' emotional distress claim is anything other than completely intertwined with her discrimination claims.

There is, in the District of Columbia, a local statute that specifically provides protection against the precise unlawful discriminatory practices Scales alleges GW engaged in. *See* District of Columbia Human Rights Act, codified at D.C. Code §§ 1-2501 *et seq*, ("DCHRA"). The statute of limitations established by the DCHRA is one year. D.C. Code § 1-2544; *Prouty v. National R.R. Passenger Corp*, 572 F.Supp. 200 (D.D.C. 1983); *Davis v. Potomac Elec. Power Co.*, 449 A.2d 273 (D.C. App.

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[20] Scales' characterization of the claim is not controlling for purposes of limitation analysis. Rather, courts look to the substantive elements of the alleged cause of action. *See, e.g., Morfessis v. Baum*, 281 F.2d 938 (D.C. Cir. 1960); *Maddox v. Bano*, 422 A.2d 763, 765 (D.C. 1980); *Keltan v. District of Columbia*, 413 A.2d 919 (D.C. 1980).

1982). Since Scales' allegations of emotional distress are inextricably bound up in allegations of discrimination forming the basis for all her myriad claims, her emotional injury claim is necessarily subject, under *Saunders v. Nemati*, to the one-year limitation period governing the local DCHRA, with which it is necessarily intertwined. Given the one-year limitation period, D.C. Code § 1-2544, and the fact that Scales sued four months late, her claim for emotional injury is time-barred.[21] The Court of Appeals thus properly affirmed the trial court's ruling "substantially for the reasons given" in its November 18, 1991 Memorandum Opinion.[22] *Cf. Celotex Corp. v. Catrett*, 477 U.S. at 327 ("We think the Court of Appeals with its superior knowledge of local law is better suited than [this Court is] to make these determinations in the first instance").

5. Scales' Breach of Contract Claim Was Properly Dismissed.

Ineluctably, because she failed to establish discrimination, Scales cannot "succeed in her common law breach of contract claim." *Scales*, 44 F.3d 1031, 1994 WL 709334 ** 1. Moreover, Scales simply failed to properly move into evidence the document dated January 21, 1977, she claims now to be a contract between GW and the federal government from which she can benefit. Cert. Pet. at 31-32. In discovery, the University searched high and low but entirely in vain for that document or any information about it and so advised Scales in responding to Request for Admissions Nos. 136 through 138 propounded in her

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[21] Although there is public policy exception for conduct that offends the DCHRA, *Howard University v. Best*, 484 A.2d 958, 986 (D.C. App. 1984), a contract claim on that theory would be barred as well by the one-year limitation for DCHRA claims. Assuming, *arguendo*, that the intentional infliction claim is not untimely, Scales' allegations are insufficient as a matter of law to constitute a viable tort claim. *See District of Columbia v. Thompson*, 570 A.2d 277 (D.C. App. 1990), *cert. denied*, 60 U.S.L.W. 3342 (1991).

[22] *See* fn. 2, *supra*.

Second Request for Admissions. That so-called contract has never been authenticated or shown to be relevant and is simply not record evidence.[23] *Cf.* Nov. 18th Sl. op. at 5 (Scales "has offered no evidence to support her contention that she was not an at-will employee").

"An employment relation of unspecified indefinite duration is presumptively employment 'at will', terminable by either the employer or the employee with or without cause." *Choat v. TRW, Inc.*, 14 F.3d 74, 76 (D.C. Cir. 1994). "In order to rebut the presumption, the employee must present evidence of a 'clearly expressed' contractual intent on the part of *both* the employer and the employee." *Id.* "In the present case, not only has [Scales] failed to establish such a clearly expressed contractual intent, but the record evidence at summary judgment was wholly inconsistent with [Scales] proposition and supportive of the presumption." *Id.*

C. SCALES UNREASONABLY QUESTIONED THE IMPARTIALITY OF THE TRIAL JUDGE.

Summary of Argument

Upon being advised by Judge Oberdorfer that he had been a patient at GW Hospital years before, Scales' counsel responded with an express waiver: "Well, your honor, that wouldn't concern me . . . ." Pet. App. at 149. Scales' failure thereafter to file a disqualification motion sometime during trial, or even afterward in a motion for reconsideration likewise constitutes a bar. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 868 (1988) (judgment will not be disturbed if plaintiff "did not make a timely request for relief"). Any recusal error, moreover, would be harmless. *Id.*, 486 U.S. at 862 ("there is surely room for

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[23] As Petitioner puts it, "[b]oth in her [appellate] brief and oral argument, Scales . . . sustained the . . . legal theory." Cert. Pet. at 32. She failed, however, to get it in the district court record, much less "sustain" it at the trial level.

harmless error" even in disqualifying circumstances).

1. Scales Failed To Preserve The Right To Attack The Trial Court's Partiality.

As in much of the rest of her case, Scales failed to preserve the issues raised for the first time in her motion for summary reversal filed in the Court below. Indeed "a party having information that raises a possible ground for disqualification can[not] wait until after an unfavorable judgment" to complain. *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992). Failure to file a disqualification motion sometime during trial, or even afterward in a motion for reconsideration, constitutes a bar to challenge a judge's impartiality. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. at 863, 868 ("Section 455 does not, on its own, authorize the reopening of closed litigation" * * * It is inappropriate to vacate a judgment if "it can be said that [petitioner] did not make a timely request for relief" under Fed. R. Civ. P. 60(b)). *See also, Lunde v. Helms*, 29 F.3d 367, 370 (8th Cir. 1994) ("As a preliminary matter, we note that the district court could have denied the motion to recuse as untimely filed"); *United States v. McCord*, 509 F.2d 334, 346 n. 33 (D.C. Cir. 1974), *cert. denied* 421 U.S. 930 (1975)(Appellant "made timely objections at trial to certain actions of trial judge and made a more general motion directed to recusal . . . . The issue has thus been preserved for appeal"); 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction § 3553, at 658 n.17 (2d ed. 1984)(citing cases).

"[B]y his silence" in *Liljeberg v. Health Services Acquisition Corp.*, "Judge Collins deprived [plaintiff] of a basis for making a timely motion for a new trial." *Id.*, 486 U.S. at 867. Nonetheless, the *Liljeberg* plaintiff filed a "motion to vacate" pursuant to Fed. R. Civ. P. 60(b)(6) "as promptly as possible." *Id.*, 486 U.S. at 852. Here, in response to being advised at the beginning of trial of Judge Oberdorfer's earlier hospitalization, Ms. Scales' counsel remarked that the disclosure did not

"concern" him. Pet. App. at 149.

In this case, "the trial judge raised the possibility of disqualification himself at the very beginning. Before trial began, he gave a full and fair disclosure of his situation. . . ." *Delesdernier v. Porterie*, 666 F.2d 116, 122 (5th Cir. 1982), *cert. denied*, 459 U.S. 839 (1982). In this case, just as in *Delesdernier v. Porterie*, "it cannot be seriously argued that [Ms. Scales or her counsel] were unaware before trial began of facts which might arguably support a § 455 motion for disqualification." *Id.*, 666 F.2d at 122. And in this case, just as in *Delesdernier v. Porterie*, "the motion raised for the first time on appeal, and after [a] full trial[] on the merits, is too tardily made for" this Court to consider it now. *Id.*, 666 F.2d at 122-123.

2. Scales' Baseless Speculation Does Not Require Disqualification.

Even if Scales had preserved the claim of partiality, her charge of bias necessarily fails. Although Scales complains of pretrial decisions that resulted in dismissal of the bulk of her claims which she now attributes to disabling prejudice, it is clear that a judge's adverse rulings in and of themselves cannot amount to an assertion of personal bias or prejudice sufficient to justify recusal. There is simply nothing in the record that suggests anything but an abundantly fair and impartial proceeding below.

Without any factual basis whatsoever, Scales now contends that retrial is appropriate "in view of the relationship [Judge Oberdorfer] formed and maintained with defendant's hospital for over a period of three years." Cert. Pet. at 54. There is no evidence that the trial judge formed any relationship with GW at all, much less maintained one for three years. Even in considering a timely motion, rumor, beliefs, conclusions, speculation and opinion are simply not sufficient to form the basis for disqualification of a judge. *See, e.g., United States v. Burger*, 773 F. Supp. 289 (D.Kan. 1991).

"The district judge in this case was, of course, intimately familiar with the record and knew as a matter of fact" that his impartiality could not be reasonably questioned. *United States v. Pollard*, 959 F.2d 1011, 1031 (D.C. Cir. 1992), *cert. denied*, 113 S.Ct. 322 (1992). It has been observed that "[o]nly the individual judge knows fully his own thoughts and feelings and the complete context of facts alleged.'" *United States v. Haldeman*, 559 F.2d 31, 131 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977), (citation omitted). Indeed, "[r]ecusal is a highly personal decision * * * This is not a decision that an appellate panel may make for a district court judge in the first instance." *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287, 1301 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 825 (1988).

The record is notably devoid of any evidence that the alleged extrajudicial contacts infected the proceedings. Ms. Scales was provided every opportunity to present her claims and evidence. Judge Oberdorfer repeatedly reconsidered his decisions when asked, and was extravagantly lenient in allowing Ms. Scales' attorney every conceivable opportunity to prove his case at trial. Given the acknowledged length and complexity of the proceedings in the district court, the number of hearings held and the nature of Judge Oberdorfer's remarks, the Court of Appeal's resolution of Scales' contentions was unquestionably correct.

3. Any Error Ascribable to Judge Oberdorfer's Continuing to Sit Would Be "Harmless Error."

Even if this Court could conclude that a Section 455 violation occurred, reversal is not automatic. As with other areas of the law, the "harmless error" rule applies to a breach of a judge's duty to stand down under Section 455. *In re Continental Airlines Corp.*, 901 F.2d 1259, 1263 (5th Cir. 1990), *citing, Liljeberg v. Health Services Corp.*, 486 U.S. at 861-862.

In due course of Scales' appeal, there was a *de novo* review of Judge Oberdorfer's orders granting summary judgment

and the final judgment entered at the close of Scales' trial evidence. It is well settled that "failure to disqualify. . . may be harmless error when a court of appeals will later review a ruling on a plenary basis." *In re School Asbestos Litigation*, 977 F.2d 764, 786 (3rd Cir. 1992) *citing Parker v. Connors Steel Co.*, 855 F.2d 1510, 1526-1527 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989) (summary judgment ruling); *In re Continental Airlines Corp.*, 901 F.2d at 1263 (same); *United States v. Vespe*, 868 F.2d 1328, 1342 (3d Cir. 1989) (dictum that if district court had abused its discretion in refusing to disqualify, the error would have been harmless because plenary review applied to ruling on motion for judgment notwithstanding verdict).

CONCLUSION

The trial court did not err in continuing to sit or in granting the University's motions for partial summary judgment or in awarding judgment to GW after Scales' Title VII claims were tried to the court. For the foregoing reasons, the George Washington University respectfully submits that *certiorari* should not be granted because the petitioner presents no issue appropriate for this Court's review.

Dated: May 1995

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APPENDIX

APPENDIX - PERTINENT STATUTE

The District of Columbia Human Rights Act, codified at D.C. Code § 1-2501 et seq., specifically provides that:

> (a) It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the race, [or] color . . . of any individual:
>
> > (1) to fail or refuse to hire, or to discharge, any individual; or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, including promotion; or to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee.

D.C. Code § 2512(a). The act further provides that:

> (b) It shall further be an unlawful discriminatory practice to do any of the above said acts for any reason that would not have been asserted but for, wholly or partially, a discriminatory reason based on the race, [or] color . . . of any individual.

Supreme Court, U.S.
FILED
MAY 19 1995
CLERK

No. 94-1671

In The

Supreme Court of the United States

October Term, 1994

Deborah Quick Scales,

Petitioner,

v.

The George Washington University,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Petitioner respectfully submits this Reply to the Respondent's BRIEF IN OPPOSITION ("BIO") to address arguments first raised in the BIO. More importantly, the Reply is needed to rectify substantially misleading representations which pervade the contents of the BIO.

I. THE ARGUMENT THAT PETITIONER WAIVED HER SEVENTH AMENDMENT JURY TRIAL RIGHTS IS SIMPLY PREPOSTEROUS

The BIO advances the argument that Petitioner (Scales) waived her Seventh Amendment jury trial rights by failing to raise her argument in a timely manner [BIO p. 15 et. seq.] It is apparent that Respondent's counsels can benefit from a refresher course in Federal Rules of Civil Procedure. The procedures that govern the demand as well as waiver of Seventh Amendment jury trial rights are well ordained in the Federal Rules of Civil Procedure [F.R.Civ.P.].

Rule 38, F.R.Civ.P., provides:

> "(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.
>
> "(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefore in writing at any time after the commencement of the action .... Such demand may be indorsed upon a pleading of the party.
>
> "(c) Same: Specification of Issues. In the demand a party may specify the issues which the party wishes to be

tried; otherwise the party shall be deemed to have demanded trial by jury for all of the issues so triable ...."

Consistent with this fundamental Rule, Petitioner DEMANDED her jury trial rights by indorsing in her pleading (Complaint) the following:

"DEMAND JURY TRIAL ON ALL ISSUES TRIABLE BY RIGHT TO A JURY."

Rule 39, F.R.Civ.P., provides:

"(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by a jury, unless (1) the parties or their attorneys of record, by written stipulation made in open court and entered into the record, consent to trial by the court sitting without a jury or (2) the court by motion of its own initiative finds that a right of trial by jury of some or all of the issues does not exist under the Constitution or statutes of the United States."

At no point through the course of the district court's protracted proceedings has the Petitioner so much as suggested that she waived her right to jury trial on a single issue or departed from her demand that she be granted her Seventh Amendment right to jury trial on all issues triable by right to a jury. These are the procedural rules that control the demand and enforcement as well as waiver of jury trial rights. What cannot be denied, modified or manipulated out of existence is Petitioner's demand for her rights in accordance with the controlling law.

Despite her demand and constitutional entitlement, the district judge, whose fairness and impartiality might reasonably be questioned, chose to engage in nearly three years of protracted summary proceedings by means of which he erroneously and summarily dismissed every single count and issue that would have entitled Scales to her Seventh Amendment demand.

Scales appealed the erroneous summary rulings to the court below. In turn, the appeals court upheld the dismissals of the district judge without ever addressing whether the summary rulings of the district court departed from the Standards of Review on summary judgments. Instead, the appeals court ruled, on NOVEMBER 28, 1994, that "REGARDLESS" of whether or not the district court correctly dismissed Scales' causes of action, she is estopped from pursuing them because she did not succeed in her equitable (juryless) Title VII claims. The ruling unequivocally conflicts with this Court's decision in Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (March 20, 199) and the Seventh Amendment.

Within three weeks from the date of this erroneous judgment, Scales filed a Petition for Rehearing [on December 16, 1994] reminding the court of its deviations from Constitutional mandates. The Petition was denied on January 17, 1995. Not only that Scales has raised and demanded her Seventh Amendment right in accordance with the controlling law, but there is simply no room to suggest that any of her demand was untimely. As for Respondent's claim that the appeals court ruling is "harmless error," suffice it to note that judicial deviation from Constitutional mandate is never harmless error.

II. PETITIONER NEVER WAIVED OR IN ANY WAY DIMINISHED HER CHALLENGE TO THE DISTRICT JUDGE'S IMPARTIALITY

The Respondent asserts that Scales' failed to preserve "the right to attack the trial court's partiality" and that, somehow, she waived her right to do so BIO, pp. 24-28. This is a gargantuan misrepresentation.

For a period of three years, the district judge "remained silent" and failed to disclose the doctor-patient, hospital-patient relationship he created with the defendant - petitioner's employer of over 21 years. In the course of disqualifying prospective jurors for less reason than he had to disqualify himself, the judge chose to mention his own doctor-patient, hospital-patient relationship with the defendant. He stated:

"THE COURT: THAT BRINGS UP A QUESTION. I SHOULD HAVE TOLD YOU THIS BEFORE. BUT I WAS A PATIENT AT GW HOSPITAL SOME THREE YEARS AGO. I DON'T KNOW WHETHER I BROUGHT THIS UP BEFORE, BUT IT SHOULD BE BROUGHT UP. I DON'T CONSIDER IT A DISQUALIFYING FACTOR. [APX, pp. 148-149]

"MR. MEKBIB: WELL, YOUR HONOR, THAT WOULDN'T CONCERN ME **SO LONG ... [INTERRUPTION BY JUDGE.** BUT FOR THE INTERRUPTION, THE COMPLETE SENTENCE WAS: WELL, YOUR HONOR, **THAT WOULDN'T CONCERN ME SO LONG AS THE JURY'S VERDICT CONTROLS THE OUTCOME OF THE CASE**."]

BUT THE JUDGE DIRECTED: "DON'T SAY ANYTHING NOW."

RULED: "I AM NOT GOING TO RECUSE MYSELF."

HE ALSO ADVISED: "YOU MAY NEED THIS ON APPEAL."

HE FURTHER RULED: "THE DECISION ABOUT WHETHER IT IS DISQUALIFYING IS MINE."

HE FURTHER ADVISED: "YOU DON'T WAIVE ANY CLAIM ABOUT IT, BUT I WANT YOU TO KNOW IT." [APX, pp. 148-9.]

Against the background of this transcript, the Respondent's representation to this Court that Petitioner expressly waived her challenge by stating "that wouldn't concern me" [at p. 24] is evidence of the sanctionless process in which attorney misconduct has been allowed to fester. It should be remembered that this misrepresentation is made by the same army of the Respondent's attorneys who were aware for years of the judge's relationship with their client, had remained silent all through the lower court proceedings and benefitted from a multitude of

summary judgments dismissing Petitioner's legitimate claims by a judge whose impartiality might reasonably be questioned.

While the Petitioner is under no obligation to convert a federal courtroom into an African banana market by arguing with the judge about his rulings and instructions, the procedures for challenging the judge's impartiality are set forth by law.

At the outset, Section 455 "is self enforcing on the part of the judge" and envisions sua sponte disqualification of judge when his/her impartiality might reasonably be questioned. Potashnick v. Port City Construction Co., 609 F2d 1101 (CA5, Ala. 1980); cert. denied, 449 U.S. 820; Davis v. Board of School Commissioners of Mobile County, 517 F2d 1044 (5th Cir. 1975); cert. denied, 425 U.S. 944; Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988).

A challenge to a judge's partiality may be raised by a party "BY MOTION IN A TRIAL COURT, ON APPEAL THROUGH ASSIGNMENT OF ERRORS, BY INTERLOCUTORY APPEAL, OR BY MANDAMUS." Davis, op. cit., 1045-6. It has also been held that "FAILURE TO MOVE FOR RECUSAL AT TRIAL LEVEL DOES NOT PRECLUDE RAISING ON APPEAL ISSUE OF RECUSAL ON BASIS JUDGE SHOULD HAVE DISQUALIFIED HIMSELF." Noli v. C.R.I., 860 F2d 1521, 1522 (9th Cir. 1988].

In the case at bar, the judge himself has concluded that Petitioner did not "waive any claim" about her challenge to his impartiality. He also directed that the issue be raised "on appeal." Petitioner did precisely that - raise the issue on appeal as directed by the judge and in accordance with the controlling law. There is absolutely no issue of waiver.

As for Respondent's suggestion that the judge's violation of Section 455 be deemed "harmless error," suffice it to note that judicial violation of the mandates and will of Congress is always harmful - a citizen is languishing in protracted litigation for over eight years while awaiting to be heard by a judge whose impartiality might not be reasonably questioned and by a jury of her peers!

III. AMERICAN JURISPRUDENCE SHOULD NOT BE TARNISHED WITH A HOLDING THAT A FEDERAL JUDGE, MANDATED BY LAW TO AVOID EVEN THE APPEARANCE OF PARTIALITY, MAY SIT IN JUDGMENT OF THE CHALLENGE TO THE CONDUCT, OMISSIONS AND EMPLOYMENT PRACTICES OF HIS DOCTORS, NURSES AND HOSPITAL

The Petition before this Court is not only one that depicts the judge's unequivocal deviation from the Congressional mandates of Section 455 but leaves no room to debate the reasonable and objective perception that the judge's impartiality may be questioned. If the Petition for Writ of Certiorari is denied by this Court, American Jurisprudence would inevitably be tarnished with the unconscionable conclusion that a federal judge may retain standards of fairness and impartiality and adjudge the conduct of a hospital institution whose nurses, doctors and administrators were responsible for the sustenance of his life.

IV. "MUCH ADO ABOUT NOTHING" - THERE WAS NOTHING WRONG WITH PETITIONER'S TRIAL STRATEGIES

Desperation is the mother of fabrication. This appears to be the rationale for the denigration of Petitioner's trial strategies [BIO, pp. 6-11]. There was nothing wrong with Scales' trial strategies. Proffer of defendant's articulated, nondiscriminatory reasons during Scales' case-in-chief is consistent with recognized methods of Title VII trials. Thus, the leading treatise on Employment Discrimination Law instructs:

> "Although McDonnell Douglas and its progeny outline the order and allocation of proof as a three-stage process, it is clear that the presentation of evidence does not contemplate a trifurcated trial, but simply sets forth the proper method of analysis after the relevant evidence is before the court. Evidence relating not only to the plaintiff's prima facie case, but also defendant's articulated nondiscriminatory reason and the plaintiff's

demonstration of pretext, is frequently presented during the course of the plaintiff's case in chief." Schlei & Grossman, Employment Discrimination Law, (Second Edition, BNA, Inc./ABA, 1986) pp. 1321-1322.

In further support, please see, inter alia, Worthy v. U.S. Steel Corp., 616 F.2d 698, 701 (3rd Cir. 1980); Whack v. Peabody & Wind Engineering Co., 595 F.2d 190, 193 (3rd Cir. 1979); McNeil v. McDonough, 515 F.Supp. 113, 125-6 (D.N.J. 1980); Lieberman v. Gant, 630 F.2d 60, 65-66 (2nd Cir. 1980).

Had the case been tried before a judge whose fairness and impartiality might not be reasonably questioned, the merits and value of Scales' trial strategies would have become apparent.

V. REPLY TO RESPONDENT'S "COUNTER STATEMENT OF THE CASE"

The Respondent's effort to deny its segregation of jobs on racial lines or its policies of parti pris [BIO p. 3 et. seq.] is belied by the facts.

In the Department of Nursing alone, of the 509 incumbents in "Nursing Management" positions, 449 are white, only 61 are black. All 6 of the nursing administrators are white. Only 2 of the 22 Associate Directors are black. The last black to serve in this position was terminated in 1984. The positions have since remained all white. In the Nursing Unit Coordinator position [for which Petitioner was a candidate], 52 of the 60 NUCs are white, only 5 are black. Eleven of the 12 Nurse Reviewers are white, 1 is black; 16 of the 18 Nurse Specialists are white, 1 is black; 44 of the 45 Clinical Nurse Specialists are white, 1 is black; 62 of the 66 Mid-Level Practitioners are white, only 2 are black. All of the Nurse Recruiters, Nurse Anesthetist, Epidemiologist, Nursing Research Coordinators are white. [Please see APX. pp.272-276.]

By contrast, that racially segregated "understructure of black underpaid workers {who have} lost pride in themselves" represent over 69 percent of the clerical, para-professional and menial job categories. They represent 81.8 percent of the patient escorts (216 of 264 employees); 100 percent of the nursing division assistants; 79.6 percent of the LPNs; 72.8 percent (501 of 688 employees) of the station

secretaries; 79.3 percent (249 of 314) of the nursing assistants. Overall, out of 2,967 of employees in these semi-skilled and menial job groups, a whopping 2,056 are black. [Please see APX. pp. 278-281.]

As acknowledged by the defendant's own expert witness, Lance Seberhagen, his own data and analysis shows differences in mobility between black and white nurses "that white nurses end up in nursing unit coordinator positions, which they leave at a faster pace than black nurses do." [Please see APX. pp.258-9.]

More importantly, **the probative value of Scales' statistical evidence is acknowledged by the judge himself.** To wit:

> "THE COURT: THERE IS ONE PART OF DR. WORK'S WORK THAT DID NOT ENCOUNTER TECHNICAL, STATISTICAL OBJECTIONS WHICH HAS HIS PROFILE, THIS TABLE OF ORGANIZATIONS, OF THE VARIOUS ELEMENTS OF THE HOSPITAL [i.e. Scales' statistical data at APX pp. 272-286] ....
>
> "THE COURT: **THE WHITE TOP AND MINORITY (BLACK) BOTTOM** ....
>
> "THE COURT: LET ME JUST SAY THIS TO YOU (addressing defendant's lead counsel)
>
> **"THE COURT: THERE IS A GROSS IMPRESSION CREATED BY THAT TABLE, THOSE TABLES, THAT THERE IS OVER-REPRESENTATION OF WHITES FIRST IN THE TOP MANAGEMENT OF THE NURSING BUSINESS, IN THE MIDDLE ELEMENT WHERE MS. SCALES WAS, AND A GROSS UNDERREPRESENTATION OF WHITES IN THE LOWER LEVEL** ....
>
> "THE COURT: NOW, THAT'S A PICTURE ....
>
> **"THE COURT: NOW, IS THAT RELEVANT? NOW, ARE YOU TELLING ME [addressing Mr. Frazier, defense lead counsel] THAT THAT PICTURE ISN'T COMPETENT, ISN'T PROBATIVE, OR WHAT?**

"MR. FRAZIER: ... THE PROBLEM ALSO IS WE HAVE TO LOOK TO THE FACT THAT THERE ARE DIFFERENT QUALIFICATIONS REQUIRED AT DIFFERENT LEVELS, DIFFERENT EXPERIENTIAL QUALIFICATIONS. **THERE ARE UNDOUBTEDLY PEOPLE [meaning "Negroes"] AT THE UNIVERSITY WHO HAVE BEEN A STAFF NURSE FOR MANY, MANY YEARS WHO ARE STILL STAFF NURSES NOW, AFTER HAVING BEEN STAFF NURSES FOR 10 YEARS, FOR 15 YEARS, FOR 20 YEARS, WHO HAVE NO INTEREST IN MANAGEMENT, WHO HAVE NO MANAGEMENT SKILL. THAT IS NOT WHAT THEY WANT TO DO.**

"THE COURT: YOU KNOW, I USED TO HEAR THAT 30 YEARS AGO. THEY DON'T REALLY WANT TO GO TO SCHOOL ....

"THE COURT: IS THIS PICTURE (i.e. the picture drawn from Scales' statistical evidence) TO BE DISREGARDED BY TRIER OF FACT? ....

"THE COURT: AND HOW? ...

"THE COURT: WHAT AM I SUPPOSED TO DO WITH THAT FACT? IT DOESN'T REQUIRE MUCH EXPLANATION, DOES IT?"

[Transcript of the Bench Trial proceedings, Wednesday, May 5, 1993, Volume 12, pp. 12-121 through 12-124]

Petitioner did not suffer the adverse judgments against her because of her trial strategies or lack of evidence to support her. She lost because her case was not tried before a judge whose impartiality might not be reasonably questioned.

CONCLUSION

For the above reasons, Certiorari should be granted to review the judgment and order below, summarily reverse the judgment and order of the D.C. Circuit, mandate the recusal of the district judge and remand the case [the Section 1981, breach of contract, fraud, intentional infliction of emotional distress and Title VII claims] for jury trial and adjudication by a district judge whose impartiality might not be reasonably questioned.

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